CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919 1920

No. [redacted]70

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

vs.

ISABEL H. JOHNSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 24, 1919.

(26,062)

(26,962)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 876.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.

1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5160.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff, in Error,

vs.

ISABEL H. JOHNSON, Defendant in Error.

Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on a writ-of-error now pending before it discloses the following:

Isabel H. Johnson, the defendant in error, instituted an action against the plaintiff in error to recover the amount for which the plaintiff in error had insured the life of George P. Johnson, her husband, and which was made payable to her upon proper proofs of his death.

The complaint alleges that he died by suicide on or about the 28th day of February, 1911, while said policy was in full force and effect.

The policy of insurance issued by the plaintiff in error, and which is the basis of this action, contains the following, among other provisions: "or if within two years from the date hereof, the said insured shall * * * die in consequence of a duel, or shall, while sane or insane, die by his own hand, then, and in every such case, this policy shall be void."

It is undisputed that the alleged death occurred more than two years from the date of the policy, and if he is dead, that he came to his death by his own hand.

2 At the conclusion of the evidence the plaintiff in error requested the court to direct a verdict in favor of the defendant, and alleged as grounds therefor, among others: "As a matter of law upon the whole record, if the insured is dead, he died by suicide and it is contrary to the policy of the law as inforced by this court to allow a recovery where the insured came to his death by suicide," which request was by the court denied.

The court in its charge to the jury said: "Did this man make away with himself on the 28th day of February, 1911? Is he dead? If he *was* then this woman is entitled to recover on this policy."

Proper exceptions were saved by the plaintiff in error to the refusal of the court to direct a verdict in its favor as requested, and also to the above charge of the court that, if the assured made away with himself on the 28th day of February, 1911, then the plaintiff is entitled to recover.

The jury returned a verdict in favor of the defendant in error, the plaintiff in the court below, upon which judgment was entered.

It is further certified that the following questions of law are pre-

sented by the writ of error prosecuted by the defendant in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon them.

3 One. Does the provision of the policy "if within two years from the date hereof said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void," there being no other provision in the policy as to suicide, make the company liable on the policy payable to his wife, if the assured died by his own hand more than two years from the date of the policy?

Two. Is a contract of insurance on the life of a person, which upon his death is made payable to his wife, which policy makes no provision for death resulting from suicide, if the suicide was committed more than two years after the issuance of the policy, void as being against public policy?

WILLIAM C. HOOK,
Circuit Judge;
JACOB TRIEBER,
District Judge,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Sitting in this Case.

4 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of The Northwestern Mutual Life Insurance Company, Plaintiff in Error, vs. Isabel H. Johnson, No. 5160, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this fourth day of February, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

5 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, December Term, 1918. No. 5160. The Northwestern Mutual Life Insurance Company, Plaintiff in Error, vs. Isabel H. Johnson. Certificate of Questions to the Supreme Court of the United States. Filed Feb. 4, 1919. E. E. Koch, Clerk.

Endorsed on cover: File No. 26,962. U. S. Circuit Court Appeals, 8th Circuit. Term No. 876. The Northwestern Mutual Life Insurance Company vs. Isabel H. Johnson. (Certificate.) Filed February 24th, 1919. File No. 26,962.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 876.

(OCTOBER TERM, 1918.)

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION.

Comes now The Northwestern Mutual Life Insurance Company, Plaintiff in Error in the above entitled cause, by George Lines, its attorney and counsel, and moves this Honorable Court to enter an order herein requiring that the Honorable, the Circuit Court of Appeals for the Eighth Circuit, certify the whole record in the above entitled cause to this Court for its review and determination upon the errors assigned, and that a writ of certiorari or other process issue, directed to said Circuit Court of Appeals, in order that the whole of said record may be so certified, and to that end it now tenders herewith its petition and brief in support thereof, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

Geo. Lines

Attorney and Counsel for The Northwestern Mutual Life Insurance Company, Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 876.

(OCTOBER TERM, 1918.)

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

NOTICE TO DEFENDANT IN ERROR.

To Isabel H. Johnson, Defendant in Error in the above entitled cause:

You are hereby notified that The Northwestern Mutual Life Insurance Company, Plaintiff in Error in the above entitled cause, will on Monday, the 6th day of October, 1919, upon its verified petition and a copy of the entire record in said cause, at the opening of said United States Supreme Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for a writ of certiorari and brief in support thereof is herewith served upon you) to the Supreme Court of the United States in its Court Room in Washington, D. C.

Geo. Sinnes

Attorney and Counsel for The Northwestern Mutual Life Insurance Company, Plaintiff in Error.

Service this day is hereby acknowledged of the foregoing notice of motion and copy of motion, and petition for writ of certiorari, and brief in support thereof.

Dated .....May. 24. th....., 1919.

S. F. Prouty

Attorney and Counsel for Isabel

IN THE

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NUMBER 876.

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THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

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ISABEL H. JOHNSON, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION AND STIPULATION FOR CERTIFICATION OF COMPLETE RECORD.

Come now the parties to the above entitled cause, The Northwestern Mutual Life Insurance Company, Plaintiff in Error, by George Lines, its attorney and counsel, and Isabel H. Johnson, by S. F. Prouty, her attorney and counsel, and state to the Honorable the Supreme Court of the United States, that the questions herein certified cannot be properly presented by counsel nor fully determined by this Court without a complete record of the case as the same was made, presented and appears in the said Circuit Court of Appeals.

WHEREFORE, they most respectfully pray this Court to enter an order requiring the Honorable, the Circuit Court of Appeals for the Eighth Circuit to certify the whole record in the above entitled cause to this Court for its review and determination, not only of the questions of law certified but as well of the errors of law assigned, and that a writ of certiorari or other process issue, directed to said Circuit Court of Appeals, in order that the whole of said record may be

so certified, to the end that said cause may be fully heard and finally determined in this Court.

Geo. Lines

Attorney and Counsel for The Northwestern Mutual Life Insurance Company, Plaintiff in Error.

S. F. Prouty

Attorney and Counsel for Isabel H. Johnson, Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 876.

(OCTOBER TERM, 1918.)

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE SAID CIRCUIT COURT OF APPEALS TO CERTIFY TO THIS COURT, FOR ITS CONSIDERATION, REVIEW AND DETERMINATION, THE WHOLE RECORD IN SAID CAUSE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Northwestern Mutual Life Insurance Company, Plaintiff in Error in the above entitled cause, respectfully shows to the Court as follows:

1. Isabel H. Johnson filed her verified petition at law in the District Court of the State of Iowa, in and for Polk County, against The Northwestern Mutual Life Insurance Company, on a policy of life insurance in the sum of $4,000.00, issued by said Company to, and on the life of, George P. Johnson, husband of the plaintiff. In her petition the plaintiff alleged that she was the beneficiary named in the policy, which was issued by the Company on August 26, 1895. The petition further alleged:

> "That the said George P. Johnson died by suicide on or shortly subsequent to the 28th day of February, 1911, while said policy was in full force and effect.

"That the defendant, although fully advised of said death has, at all times, denied its liability to plaintiff on said policy." (Rec. p. 4.)

That by reason of the premises the Company was indebted to the plaintiff in the sum of $4,000.00, with interest from February 28, 1911, for which she prayed judgment. A copy of the policy was subjoined to the petition as an exhibit.

The only reference in the policy touching death by suicide is as follows:

"This policy is issued and accepted by the parties in interest on the express conditions stated on the second page of this policy, which are hereby made a part of this contract. * * *

"Conditions Referred to on the Preceding Page of this Policy. * * *

"* * * if, within two years from the date hereof, the said insured * * * shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be null and void." (Rec. pp. 6, 7.)

2. That on the petition of defendant Company the cause was removed to the District Court of the United States for the Southern District of Iowa. That the defendant in said Court answered, admitting the issuance of the policy, denying that it has been given proofs of death as prescribed by the policy, and denying that George P. Johnson, the insured, was dead.

By reply the plaintiff alleged that the Company had waived proofs of death, and further alleged—

"That the sole question involved in this controversy is whether or not the said George P. Johnson died by suicide on or about the 28th day of February, 1911, this the plaintiff alleges and the defendant denies, after full knowledge of all the facts relied upon by plaintiff to establish said death and is now going to trial on said issue." (Rec. p. 18.)

3. That said cause was duly tried to a Court and jury in said United States District Court. The testimony of plaintiff, Isabel H. Johnson, was to the effect that George P. Johnson, the insured, while of sound mind, committed suicide on February 28, 1911. The Company contended that the death of the insured, being directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policy in suit. The question was squarely raised by motion for directed verdict (Rec. p. 102), to the overruling of which

exception was duly taken (id. p. 104); and by exceptions to the charge of the court (id. p. 118) wherein the court charged the jury that suicide was not a defense. The jury returned a verdict in favor of plaintiff, upon which a judgment was entered against The Northwestern Mutual Life Insurance Company. That said Company thereupon caused said cause to be removed by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit; wherein said cause was duly argued by counsel for the respective parties and submitted on December 11, 1918.

That on February 4, 1919, the Judges sitting in said Circuit Court of Appeals, differing in opinion as to the rules of law applicable to said cause, signed a certificate in which were made findings of fact and certain requests for instruction by this Court relative to certain questions of law, all of which more distinctly appear by the certificate signed by said Judges and duly filed in this Court.

4. A certified copy of the entire record in said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Court relative to causes brought from the Circuit Court of Appeals, and said Record is marked "Exhibit 'A'".

5. Your petitioner believes that the questions certified to this Court by said Circuit Court of Appeals do not fairly or correctly state the issues of law presented by the record of said cause; that the questions as certified are misleading, and as stated in said certificate were not tendered or presented by the record; and that by them justice is denied petitioner; and that the importance of the answers to the questions propounded in said certificate largely depends upon the state of the record as actually made, and that proper answer to said questions cannot, as your petitioner believes, be made except upon an understanding of the whole record.

6. That among the questions of law actually raised in the submission of said cause in said Circuit Court of Appeals, as will be fully disclosed by the record therein, are the following:

(1) Whether suicide is a good defense to an action on a life insurance policy where, more than two years after the issuance of the policy, the insured committed suicide; the policy, which was payable to the wife of the insured, providing that "if within two years from the date hereof said insured * * * shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void," and there being no other provision in the policy as to suicide.

(2) Whether in a life insurance policy in which the wife of the insured is named as beneficiary, a contractual prohibition against suicide on the part of the insured,

within two years from the date of the policy, prevents the Company from raising the defense of suicide where, in an action on the policy, it appears that the insured committed suicide more than two years after the date of the policy.

(3) Whether suicide is a good defense to an action on a life insurance policy by its terms payable to the wife of the insured, which policy contains no provision as to death resulting from suicide committed more than two years after the date of the policy, where the insured committed suicide more than two years after the date of the policy.

(4) Whether in a life insurance policy a prohibition against the insured committing suicide within two years from the date of the policy amounts in law, as between the parties, to a licensing of it after that period; that is to say, whether, where the insured committed suicide more than two years after the date of the policy, the insurer has the right to avail itself of the defense of suicide.

(5) Whether in an action on a life insurance policy where it affirmatively appears that the insured, being of sane mind, committed suicide, irrespective of the provisions of the policy, the defense of suicide inheres in the case.

(6) Whether in a policy of life insurance in which the wife of the insured is named as beneficiary, the law implies that the insured will not die by his own wilful and deliberate act; and, therefore, if he does die by such act while in sound mind, his life is terminated by a risk against which the Company has not insured.

7. That divers other questions of law, duly presented by assignments of error, inhere in the record of said cause, the decision of which by this Court is of great interest to all life insurance companies doing business within the United States, and to all persons insured therein or affected thereby.

WHEREFORE, your petitioner, The Northwestern Mutual Life Insurance Company, respectfully prays:

That an order be entered, requiring that the whole record and case be sent up to this Court for its consideration, and that the whole matter in controversy may be reviewed and decided as if it had been brought to this Court by writ of error, and that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in the said cause therein entitled, "The Northwestern Mutual Life Insurance Company, Plaintiff in Error,

vs. Isabel H. Johnson, Defendant in Error, Law No. 5160," to the end that said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," now carried forward into Section 239 of the Judicial Code; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem meet and in conformity with said Act; and that said case may be heard in this Court as if brought here by writ of error.

The Northwestern Mutual Life Insurance Company

By L. D. Van Dyke
Its President.

STATE OF WISCONSIN)
) SS.
COUNTY OF MILWAUKEE.)

BE IT REMEMBERED, that on this ..22nd..... day of May, 1919, before me, the undersigned, a Notary Public in and for said County, personally appeared W. D. Van Dyke, who being by me first duly sworn upon his oath deposed and said: That he has read the foregoing petition by him subscribed, and knows the contents thereof; that he was duly authorized by The Northwestern Mutual Life Insurance Company and signed the said petition by its authority and in its behalf; that the allegations in said petition are true, except as to matters therein stated to be upon information and belief, and as to such matters he believes it to be true.

Herbert N. Laflin
Notary Public in and for said County.
(Seal.)

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 876.

(OCTOBER TERM, 1918.)

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

I.

This petition is made under Section 239 of the Judicial Code. The Circuit Court of Appeals for the Eighth Circuit, desiring the instruction of this Court on several propositions of law, made a certificate which was filed in this Court on or about February 24, 1919, and made certain findings of fact in order that the questions certified might be understood.

The questions propounded in the certificate are:

One. Does the provision of the policy "if within two years from the date hereof said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void," there being no other provision in the policy as to suicide, make the company liable on the policy payable to his wife, if the assured died by his own hand more than two years from the date of the policy?

Two. Is a contract of insurance on the life of a person, which upon his death is made payable to his wife, which policy makes no provision for death resulting from suicide, if the suicide was committed more than two years after the issuance of the policy, void as being against public policy?

Your petitioner believes that the questions as certified are in certain particulars misleading; that the precise questions as stated in said certificate were not tendered in said Circuit Court of Appeals and are not, in the precise form as stated, warranted by the record, and that by them justice is denied petitioner in this:

(1) It was not contended in said Circuit Court of Appeals that the provision of the policy,—"if within two years from the date hereof said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then and in every such case, this policy shall be void,"—*made the Company liable* on the policy payable to his wife, where the insured died by his own hand more than two years from the date of the policy.

It is submitted that, upon the record, the true question presented for decision was this:

Whether in an action by the beneficiary who is the wife of the insured, on a policy providing "if within two years from the date hereof said insured * * * shall, whether sane or insane, die by his own hand, then and in every such case, this policy shall be void,"—there being no other provision in the policy as to suicide; and it appearing that more than two years from the date of the policy the insured, being of sane mind, committed suicide, the Company has the right to avail itself of the defense of suicide. That is to say, does the clause in question, where the insured commits suicide after the expiration of the two year period, amount in law to a waiver on the part of the Company of suicide as a defense to an action on the policy, or foreclose or estop the Company from raising or relying upon such defense?

(2) It was not contended in said Circuit Court of Appeals that a policy of insurance, in which the wife of the insured is named as beneficiary, which makes no provision for death resulting from suicide where the suicide was committed more than two years after the date of the policy, and where the insured more than two years after said date committed suicide, was *void*. It was contended, rather, that for considerations of sound morality and public policy there is an implied condition in every contract of life insurance that the insured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction; that it is a term of the policy, express or implied, that the insured will not die by his own wilful and deliberate act, and, therefore, if he does die by such act, being then sane, his life is terminated by a risk against which the Company did not insure. In other words, it was contended that intentional self-destruction, the insured being of sound mind, is in itself a defense to an action on a life policy, even if such policy does not in express words declare that it shall be void in the event that the insured should, *at any time*, commit suicide when of sound mind.

It is submitted that, upon the record, the true question presented for decision was this:

A life insurance policy provides as to death by suicide only this: If within two years from its date the insured "shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void." More than two years after the date of the policy the insured, being then of sound mind, committed suicide. His wife, the beneficiary named in the policy, brings action thereon against the Company. Is suicide under these facts a good defense to the action?

II.

It is a term of every policy of life insurance, implied if not expressed, that the insured shall not die by his own wilful and deliberate act; and, therefore, if he does die by such act, being of sound mind, his life is terminated by a risk against which the Company has not insured.

A.

This is the rule enforced by the Federal Courts.

Ritter v. Mutual Life Insurance Co., (1898) 169 U. S. 139;

Hopkins v. Northwestern Life Assurance Co., (1899) 94 Fed. 729; affirmed on other grounds (1900) 99 Fed. 199, 40 C. C. A. 1;

Mutual Life Insurance Co. v. Kelly, (1902) 114 Fed. 268, loc. cit. 275, 52 C. C. A. 160;

Supreme Council of Royal Arcanum v. Wishart, (1912) 192 Fed. 453, 112 C. C. A. 591.

B.

The same principle is applied to the situation where the insured has come to his death at the hands of the law.

Burt v. Union Central Life Insurance Co., (1902) 187 U. S. 362;

Northwestern Mutual Life Insurance Co. v. McCue, (1912) 223 U. S. 234.

C.

The principle is equally applicable to the situation where the beneficiary named in the policy is a third person, as well as where the beneficiary is the estate of the insured.

Hopkins v. Northwestern Life Assurance Co., (1899) 94 Fed. 729, 731 (suicide; policy payable to wife of insured);

Burt v. Union Central Life Insurance Co., (1902) 187 U. S. 362 (death at the hands of the law; original beneficiary was wife of insured, but policy was afterwards assigned to third persons);

Davis v. Supreme Council of Royal Arcanum, (1907) 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722 (suicide; wife named as beneficiary);

Northwestern Mutual Life Insurance Co. v. McCue, (1912) 223 U. S. 234, 252 (death at the hands of the law; action by children of insured as sole heirs of insured; McKenna, J.: "It is contended that if the *McCue* estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, the policy is the measure of the rights of everybody under it, and as it does not cover death by the law there cannot be recovery either by McCue's estate or by his children");

Supreme Council of Royal Arcanum v. Wishart, (1912) 192 Fed. 453, 112 C. C. A. 591 (suicide; third person beneficiary);

Security Life Insurance Co. v. Dillard, (1915) 117 Va. 401, 84 S. E. 656 (suicide; wife beneficiary; held, following *Ritter* case, that wife could not recover);

Scarborough v. American National Life Insurance Co., (1916) 171 N. C. 353, 88 S. E. 482, L. R. A. 1918 A, 896, Ann. Cas. 1917 D, 1181 (death at the hands of the law; mother of insured named as beneficiary; recovery denied);

American National Insurance Co. v. Munson, (Tex. Civ. App. 1918) 202 S. W. 987 (death at the hands of the law; sister of insured named beneficiary).

III.

The provision in the policy in the case at bar, excepting liability for death by suicide, sane or insane, within two years from the date of the policy, does not deprive the Company of the defense of suicide where the insured, more than two years after the date of the policy, when in sound mind, deliberately and intentionally takes his own life.

"By this provision, if the insured takes his own life within the period named, there is no question of sanity or insanity to be determined, because the contract in effect stipulates that, under such circumstances, there shall be no liability, whatever the condition of the insured might have been as to sanity or insanity. It would seem necessarily to follow that cases of suicide, after the expiration of this prescribed period, must be governed by the general law of the contract to which we have above alluded, and the liability of the insurer will depend upon the sanity or insanity of the insured."

Supreme Council of Royal Arcanum v. Wishart, (1912) 192 Fed. 453, loc. cit. 456, 112 C. C. A. 591, per Gray, J.;

Compare reasoning of Harlan, J., in *Ritter v. Mutual*

A.

Upon the same principle, where the policy contains a so-called "incontestable clause," the defense of suicide, or of death at the hands of the law, or of want of insurable interest may be raised by the Company. This is plainly the rule to be deduced from *Ritter v. Mutual Life Insurancee Co.*, (1898) 169 U. S. 139, loc. cit. 154.

See *Scarborough v. American National Life Insurance Co.*, (1916) 171 N. C. 353, 88 S. E. 482, L. R. A. 1918, 896, Ann. Cas. 1917 D, 1181 (death at hands of law);

American National Insurance Co. v. Munson, (Tex. Civ. App. 1918) 202 S. W. 987 (death at hands of law);

Bromley v. Washington Life Insurance Co., (1906) 122 Ky. 407, 92 S. W. 17, 5 L. R. A. (N. S.) 747 (want of insurable interest);

Anctil v. Manufacturers' Life Insurance Co., (1899) App. Cas. 604 (want of insurable interest);

Collins v. Metropolitan Life Insurance Co., (1905) 27 Pa. Super. Ct. 353 (death at the hands of the law).

IV.

The insured, George P. Johnson, at the time he committed suicide was of sane mind.

A.

That he was of sane mind affirmatively appears from the certificate filed in this Court.

Shipman v. Protected Home Circle, (1903) 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, 350 ("Thus the unqualified finding of the learned trial court that plaintiff's husband committed suicide is, in effect, a determination that it was the intentional act of a sane man");

Rudolph v. United States, (1911) 36 App. D. C. 385 (presumption is always of sanity, so that admission by demurrer that a person committed suicide, is an admission that he was sane when he killed himself).

B.

"The burden in such cases as the present is upon the plaintiff to prove that the insured was not of sound mind when he took his life."

Supreme Council of Royal Arcanum v. Wishart, (1912) 192 Fed. 453, loc. cit. 457, 112 C. C. A. 591; per Gray, J.;

Weed v. Mutual Benefit Life Insurance Co., (1877) 70 N. Y. 561, 563 (accord).

C.

"There is no averment or proof that the insured was insane, and the presumption of sanity must, therefore, prevail."

Hopkins v. Northwestern Life Assurance Co., (1899) 94 Fed. 729, loc. cit. 730, per J. B. McPherson, J.;

Ritter v. Mutual Life Insurance Co., (1898) 169 U. S. 139, 147;

See petition (Rec. p. 4); reply (id. p. 18); opening statement of counsel for plaintiff (id. pp. 22, 23); charge of court (id. pp. 108, 109, 118).

It is respectfully submitted to be true, from the foregoing resume and upon the record, that the questions in the precise form as stated in the certificate are not in the respects pointed out fairly stated as regards the rights of your petitioner and further, that complete justice can be done only if the whole record is before the Court for its examination and review.

All of which is respectfully submitted.

Geo. Sinnes

Attorney and Counsel for The Northwestern Mutual Life Insurance Company, Plaintiff in Error.

Eugene D. Perry

Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

Number [redacted]70

OCTOBER TERM, 1919.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

CONCURRENCE OF DEFENDANT IN ERROR IN MOTION AND PETITION FOR WRIT OF CERTIORARI.

S. F. PROUTY,
Attorney and Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 876.

OCTOBER TERM, 1919.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

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CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

CONCURRENCE OF DEFENDANT IN ERROR IN MOTION AND PETITION FOR WRIT OF CERTIORARI.

BRIEF OF DEFENDANT IN ERROR.

As bearing upon the importance and necessity of having a complete record of this cause before this court for its determination, we respectfully show to the court that the questions herein certified by the Circuit Court of Appeals were not legally and properly raised by the defendant below before or at the trial of this cause in the District Court.

1. The correspondence that took place between the representatives of the Insurance Company and the representatives of the beneficiary, appearing on pages 77-78-79-80-81 and 82 of the printed record (Exhibit "A"), shows that the officers of the Insurance Company were fully advised of the claimed suicidal death of George P. Johnson long before the suit in controversy, and that the Company did not base its

refusal to pay on that account, but based it expressly on the ground that the officers were not convinced that Johnson had committed suicide, but claimed that he had absconded and was still living. In the final letter, (page 81), Judge Barnes, General Counsel of the Insurance Company, sums up the grounds for refusal to pay in these words:

> "The Company is not satisfied from any information that is received so far that Mr. Johnson died before August 26, 1911. This is a question you will have to meet in pressing the claim on this policy."

The Company with full knowledge that the claimed death was caused by suicide never once intimated that it could or would defend on that ground. It clearly construed its own policy as covering the risk of suicide after two (2) years.

2. The plaintiff in her petition alleged the death of Johnson by suicide on or about the 28th day of February, 1911. (See Record Exhibit "A", page 4.) The defendant below entered a denial of this allegation of plaintiff's petition (See Record Exhibit "A", page 16), with full knowledge that the policy covered the risk of death by suicide after two years from issue. It made no claim in its answer that this provision of the contract was void as against public policy, and went to trial squarely on the issues as to whether Johnson did or did not commit suicide at or near said date. Extended testimony was taken by deposition of witnesses from three or four States directed to this question, and this question only. (See Record Exhibit "A".)

3. At the trial attorney for the plaintiff below in his opening statement said that the only question for determination was whether the said Johnson had committed suicide as claimed by plaintiff or had absconded, as claimed by defendant. (See opening statement pages 19-20-21-22 and 23 of Record Exhibit "A".) Mr. Perry, who tried the case for defendant below, concurred in this as being the sole issue. On page 25 of the Record Exhibit "A" he says:

> "So that, feeling that they could not find co[illegible]incing proof of his death, they elected to require the beneficiary, Mrs. Johnson, the wife of the insured George P. Johnson, to make proof concerning his death."

Again on page 26 he says:

> "In view of that, and in view of the circumstances connected with his financial situation in his capacity as guardian, and for that reason the defendants are not satisfied that Mr. Johnson is dead. So that the issue

will be, so far as you are concerned, whether or not Mr. Johnson is dead, and if so, when did he die."

From this it will appear that the sole question about which there was a contention at the trial of the case was whether or not Johnson was dead and not as to how he died. The Company, and its Counsel, during this time raised no question as to the policy covering the risk of suicide. At no time was the validity of the contract called in question until after the close of the testimony and argument of counsel, when attorney for defendant below raised the question for the first time by filing a motion for a directed verdict. We contended below, and contend now, that this question could not be raised in this manner, and the court below sustained that contention. If defendant below had desired to raise the question of the invalidity of this provision of the policy, assuming the suicide risk after two years, it might have been done either by demurrer or answer. If it had been claimed, or alleged by defendant below that suicide by a person of sound mind is a prohibited risk, then plaintiff below would have had the right to plead and show that deceased was of unsound mind when committing the act and to have had that issue tried by a jury. The defendant below not having raised that question until after the close of the evidence, plaintiff below was deprived of having this issue tried.

4. Again, the Insurance Company having issued this policy covering this risk, and having collected premium therefor, and treated it as valid at all times, even after death, the beneficiary might have successfully plead estoppel, unless the Company should tender the return of premiums. But, by not tendering this issue in its pleadings, the beneficiary was prevented from making such a plea. The injustice of allowing such a question to be raised in any other way than by pleading is apparent. If raised by pleading, it gives the other party a chance to meet it. If raised in a motion for a directed verdict, it could not be met. The statutes of Iowa, where this case was tried, fully cover this question and the Federal Court follows the laws of procedure of the State where sitting.

This is a law action and was brought in the District Court of Polk County, Iowa, and transferred to the Federal Court, and was tried in the Southern District of Iowa.

Section 914 of the Federal Statutes, Vol. 4, page 563 provides:

"The practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Court, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time

in like causes in courts of record of the State within such Circuit or District are held, any rule of court to the contrary notwithstanding."

Section 3629 of the Code of Iowa provides:

"*Matters Specifically Pleaded:*

Any defense showing that a contract written or oral, or any instrument sued on, is void or voidable, * * * must be specifically pleaded."

Counsel in the case at bar claimed that notwithstanding the fact that the policy expressly covers the risk of suicide after two years, this provision of the policy is void as against public policy.

If such was their claim or contention, they ought under the statutes of Iowa to have pleaded it. There may be some question in other jurisdictions as to the manner in which this question could be raised, but there is no question under the statutes and decisions of Iowa. Counsel did not raise the question in their pleadings, nor in their opening statement to the jury, nor at any time during the trial, until they offered the Motion for a Directed Verdict at the close of the trial. They cannot raise such a question in this way under the form of pleading in Iowa.

In the case of *Riech vs. Booch*, 68 Iowa, page 526, this question is decided. That was a case where the contract was made on Sunday, which, under the statutes of Iowa, on account of public policy, is declared void and not enforcible. The evidence tended to show that the contract in controversy was made on Sunday and consequently void. The Court says:

"There was evidence tending to prove that the contract under which plaintiff performed the labor for which he seeks to recover, was entered into between parties on Sunday. Defendant asked the court to instruct the jury that if they found that the contract was entered into on Sunday, their verdict should be for defendant. The court refused to give this instruction, and told the jury that they need not consider that claim, or the evidence which tended to prove that the contract was entered into on Sunday. Defendant assigned these rulings as error. We think they are correct. The defense which defendant sought to establish by the evidence was that the contract under which the services were rendered was illegal, and consequently void. Our statute (Code Sec. 2718) (now 3629) requires that defenses of that character be specially pleaded. Defendant did not plead that defense in his answer. He denied the terms of the agreement were as alleged by

> plaintiff, but he made no averment as to the legality of the contract. Under the pleadings he was clearly not entitled to have the question as to its legality submitted to the jury."

Under the contention of plaintiffs in error, in their argument when it appeared to the court that this was an illegal contract, it was the duty of the court to stop proceedings and dismiss plaintiff's cause of action because no rights could be based on such a contract. But the court held, and rightfully, under the statute, that if defendant wished to raise that question, he must do it in the pleadings, so as to advise the other party of the issue to be tendered.

The question is also decided in *Shawyer vs. Chamberlain,* 113 Iowa, page 742. This was a case in which it appeared that part of the goods sold were intoxicating liquors, and under the statute and prior decisions of Iowa, such contract was absolutely null and void. It appeared in the evidence that such intoxicating liquors were a part of the stock of goods transferred, and the party sought to forfeit the contract on that ground, but had not plead it. The court says (page 744):

> "The record discloses that the stock included intoxicating liquors valued at $164.34. The defendant urges that because of this the contract was void, under Section 2423 of the Code. See *Lindt vs. Uihlein,* 109 Iowa, 591. But any defense showing that a contract written or oral, * * * is void or voidable, * * * must be specially pleaded. Section 3529, Code; *Riech vs. Bolch,* 68 Iowa, 526; *Glidden vs. Hibgee,* 31 Iowa, 379. No such issue was presented by the answer until the verdict had been returned. Nor does the record show the trial to have proceeded on that theory. The evidence of intoxicating liquors came out in proving the cost price of the stock, as bearing on the measure of damages; and the court, in overruling the motion to direct verdict at close of plaintiff's evidence, distinctly rejected the attempt to inject that issue when not properly plead. In the instruction submitting the interrogatory as to whether liquors were included in the stock, the jury was told not to allow that fact any influence in determining the case."

So, clearly under the statute and decisions of Iowa, if counsel for plaintiff in error had desired to raise the question, they should have done so in their pleading; but instead of allegating suicide and claiming that thereby the policy was forfeited, and that the incontestable clause as to suicide was void as against public policy, they went to trial upon the sole issue of whether or not he was dead or had absconded.

The commonest principle in pleading requires that if one has an issue upon which he relies, he should tender it in his pleadings, or at least in the course of the trial. If suicide as a defense had been tendered by the answer, it would then have given plaintiff below an opportunity to avoid by alleging and showing that the party was insane at the time of the suicide, but by tendering no issue, no preparation could be made to show that fact. So by law and equity, they ought to have raised this issue before the completion of the trial, and not having done so, they are certainly estopped from doing it now.

So this preliminary question of pleading should first be determined by this court. If the defense of suicide was not properly raised, there is no occasion to consider the questions certified.

BRIEF ON MERITS.

It is perhaps improper and unnecessary at this time to argue the merits of the questions certified, but as counsel for plaintiff in error has seen fit to do so, we will present a short Brief in reply.

The policy in suit provides:

> "If within two years from the date hereof the said insured * * * shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be null and void."

It is the settled rule in the construction of such provisions in policies that after the expiration of the time limited the company assumes the obligation for death by suicide. (See *Goodwin vs. Provident Life Ins. Co.*, 97 Iowa, 226; 32 L. R. A., 473; *Supreme Court of Honor vs. Updegraff*, 68 Kans., 474; *Mutual Reserve Fund Life Ass'n*, 32 S. W., 52; *Royal Circle vs. Achterath*, 204 Ill., 549; 63 L. R. A., 452; *Clement vs. New York Life*, 42 L. R. A., 247.

In Cooley's Briefs on the Law of Insurance, Vol. 4, page 3229, the authorities are cited, and the rule laid down as follows:

> "The policy may contain a stipulation to the effect that after it has been in force a certain number of years it shall be incontestable, except for fraud in procuring it. Where the policy also contains a provision declaring suicide an excepted risk, the effect of the 'incontestable clause' is substantially to convert the suicide clause into a limited exception and to render the insurer liable where death by suicide occurs after the time limited in the incontestable clause."

There is no contention or chance for contention but that after two years the company by the terms of its contract agreed to carry the risk of suicide "sane or insane", but the contention is urged that, notwithstanding this express assumption of the suicide risk that that provision of the contract is void as against public policy and is not enforceable. That is to say, that under the law the insurance company has no right or power to assume such a risk, and it is hence void.

UNIVERSALITY OF THIS CLAUSE.

It is now the almost universal practice of all large insurance companies to issue policies similar to the one in this case. The Handy Guide of 1918, issued by the Spectator Company, gives, or purports to give the forms of policies issued by all the life insurance companies in the United States. From this it will appear that practically all life insurance companies are now issuing policies covering the risk of suicide either from the time of issue, or after a definite period. This is common knowledge. All the States have sanctioned the issuance of these policies and allowed the collection of premiums therefor. All the State courts, that have been called upon to pass upon the question, have sustained these provisions and held the companies liable for suicidal deaths after the time limited.

See:

Simpson vs. Life Ins. Co., 115 N. C., 393; 20 S. E. 517; *Steele vs. St.Louis Mut. L. Ins. Co.*, 3 Mo. App. 207; 2 Bacon, Ben. Soc. 694, Sec. 340a; *Mareck vs. Mutual Reserve Fund Life Asso.*, 62 Minn., 39, 54 Am. St. Rep. 613, 64 N. W. 68; *Goodwin vs. Provident Sav. Life Assur. Asso.*, 97 Iowa, 226; 32 L. R. A., 473, 59 A. M. St. Rep. 411, 66 N. W. 157; *United Life Ins. Asso.*, 68 Hun. 144, 22 N. Y. Supp. 626, affirmed without opinion in 142 N. Y. 677, 37 N. E. 824; *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 570, 17 Am. Rep. 372; *Murray vs. State Mut. L. Ins. Co.*, 22 R. I. 524, 53 L. R. A., 742, 48 Atl. 800; *Wright vs. Mutual Ben. Life Asso.*, 118 N. Y., 237, 6 L. R. A., 731, 16 Am. St. Rep. 749, 23 N. E. 186; *Kline vs. National Ben. Asso.*, 111 Ind., 462, 60 Am. Rep. 703, 11 N. E. 620; *Mutual Reserve Fund Life Asso. vs. Payne*, (Tex. Civ. App.), 32 S. W. 1063; *Patterson vs. Natural Premium Mut. Life Ins. Co.*, 100 Wis., 118, 42 L. R. A., 253, 69 Am. St. Rep. 899, 75 N. W. 980; *Brady vs. Prudential Ins. Co.*, 168 Pa. 645, 32 Atl. 102; 19 Am. & Eng. Enc. Law, 2d Ed., p. 80; 2 Bacon, Ben. Soc., Sec. 340; 3 Joyce, Ins., 2581, Sec. 2644.

RITTER CASE.

It is claimed, however, that this court in the case of *Ritter The Mutual Life Ins. Co.* 169 U. S. 139, has held that insur-

ance companies have no right to assume the risk of suicide by a sane person, and that if they do assume such risk, it would be void as against public policy. It may be conceded that there is language in that case justifying this contention. A careful analysis of that case will show however that no such question was in fact involved in it, and that what was said by the Learned Court on that subject was pure dictum and not *stare decisis*.

1. The policy in the *Ritter* case contained no express provision covering the risk of suicide.

2. In the application there was an express warranty against suicide.

3. It was shown that the insured fraudulently contemplated suicide at the time of the taking out of the policies.

4. These policies were all payable to legal representatives.

5. The defense of fraudulent suicide was alleged and proved.

No such questions are involved in the case at bar. This policy contains an express provision assuming the risk, there was no warranty against suicide, the policy was taken out more than seventeen years before the act, which would negative fraudulent intent, the policy was taken out for the protection of his wife and the burden of paying premiums she shared. In the *Ritter* case there were strong equities in behalf of the companies that provoked strained construction. The equities of the beneficiary in the case at bar call for a just, if not a liberal construction and application of the rules of law and public policy. She has committed no wrong. The insurance company has collected the premiums for covering this risk and still holds them, and is now contending that she be turned away penniless in her old and dependent age. The equities in the *Ritter* case would naturally induce a court of equity to find some way of relieving against such fraud and injustice as was attempted. The court in that case, however, does not decide the question involved in this case because no such question was presented. The language used and relied upon by counsel was simply used as argument in deciding the main issue involved.

PUBLIC POLICY.

Public policy is a shifting one. What may be against public policy at one time may not be at another. The States may declare or change their public policy by statute, by decisions of its courts and official rulings and actions of its departments. The announcement in the *Ritter* case as to the public policy of allowing insurance companies to cover this risk was made nearly a quarter of a century ago, and before the

had been crystallized on this subject. Now for more than twenty (20) years these policies have been in general use. Every State in the Union has permitted the insurance companies to issue them and collect premium therefor. Every State Court has sustained them as not being against public policy. Some of the States have gone so far as to prohibit the defense of suicide even when the policy expressly provides that such act voids the policy. What higher or clearer expression of public policy can be found? It must be conceded that the States that create and control insurance companies should declare the public policy rather than the Federal government that can neither create nor control them.

In *Hartford Fire Ins. Co. vs. C. M. & S. W. Ry. Co.*, 70 Fed. Rep., 201, 30 R. L. A. 193, the court says:

> "The public policy of a State or Nation must be determined by its constitution, laws and judicial decisions."

This question has recently been before this court in the case of *Knight Templars vs. Jarman*, 187 U. S., 197, and *Whitfield vs. Aetna Ins. Co.*, 205 U. S., 489.

The State of Missouri passed a statute preventing insurance companies from pleading the defense of suicide except where it is shown to the satisfaction of the court or jury that the party contemplated suicide at the time of taking out the policy. This statute was assailed in this court as being in conflict with the doctrine announced in the *Ritter* case. It was claimed that it "encouraged suicide." In the latter case, the court in passing upon the question said:

> "That the statute is a legitimate exertion of power by the State cannot be successfully disputed. Indeed the contrary is not asserted in this case, although it is suggested that the statute seemingly 'encourages suicide and offers a bounty therefor payable not out of the funds of the State, but out of the funds of the insurance company.'
>
> There is some foundation for this suggestion in the former decisions of this court in which it was held that public policy even in the absence of a prohibitory statute would forbid a recovery upon a life policy silent as to suicide where the insured while in sound mind willfully and deliberately took his own life. *Ritter vs. Mut. Ins. Co.*, 169 U. S., 139; but the determination of the present case depends upon other conditions than those involved in the *Ritter* case. The insurance company is not bound to make a contract which is attended by the risk indicated by the statute in question. If it

does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it will not for that reason alone be disregarded, for it is the province of the State by its legislature to adopt such policy as it deems best, provided it does not in doing so come in conflict with the constitution of the State or of the constitution of the United States. There is no such conflict here. The legislative will within the limits stated must be respected if all that can be said is that in the opinion of the court the statute expressing that will is unwise from the point of public policy."

Now, it will be noted that the effect of the statute in controversy compels all insurance companies organized or doing business in the State of Missouri to carry the suicide risk whether they contract to do so or not. This court holds that this is not contrary to public policy, but expressly holds that the State can adopt its own policy. Now, if it is not contrary to public policy for a State to force an insurance company to carry a suicide risk, by what sound reasoning could it be held that it is contrary to public policy for a State to allow insurance companies to expressly cover that risk. Missouri, as a legislative expression of this public policy, has declared that insurance companies must carry this risk. All the States, by the rulings of their Insurance Department have allowed insurance companies to cover this risk and collect premium therefor, and their highest courts have held them liable thereon. By what sound argument, or judicial discrimination could the public policy of Missouri be sustained by this court and the public policy of other States be declared void? It would be equivalent to saying that a State may force the carrying of this risk, but may not allow it. The reasoning in these cases seem to us as an express repudiation or reversal of the dictum in the *Ritter* case wherein the court declared that it is contrary to public policy to allow an insurance company to cover this risk. Would there be any question that if a policy was issued to a citizen of Missouri containing an express assumption of this risk that it would be valid and enforceable? If not, why not? Missouri has declared its public policy and this court in these cases have recognized its right so to do. Why cannot other States declare their public policy and have it recognized and sustained by this court? Public policy can be evinced by the uniform manner of doing business as well as by statute. If all the States have allowed insurance companies to assume this risk and collect premium therefor and this has been uniformly sustained by the highest courts, why

what sound reasoning can this court say that such a clause in a Missouri policy does not tend to the commission of crime and is not void as to public policy, and yet declare that a like clause in a policy issued in another State tends to the commission of crime and is therefore void as against public policy. The reasoning of these cases cannot be harmonized with the dictum found in the *Ritter* case, except upon the theory that this court recognizes the right of every State to adopt its own "public policy" on this subject.

It will appear from the authorities already cited that in the State of Wisconsin, where this policy was issued, in the State of Kansas, where it was delivered, in the State of Iowa, where the suit was brought, and in the State of Maryland, the domicil of the deceased, insurance companies have a right to insure against the risk of suicide, and the courts of these states have all declared the companies liable thereon. These states by their highest court have all declared the public policy on this question. Under the rule announced in the *Whitefield* case, above cited, this court should follow the public policy of the State, and not declare a public policy of its own.

IMPORTANCE OF THE QUESTIONS CERTIFIED.

As practically all of the insurance companies doing business in this country have for the last twenty (20) years been issuing policies covering the risk of suicide, and have been permitted by the states to issue them and collect premium therefor, it becomes a great question of public policy as to the status of these policies. Policies now outstanding cover billions of risks and involve millions of premiums paid for the risks. All of these policies have been issued under the sanctions of the States. Will this court now declare a rule of law that will render these policies void as to the insured, but valid as to insurance companies so that they can defeat recovery and yet hold the vast premiums collected for covering such risks? Will this court now adopt a rule that will unsettle this vast business?

PAYABLE TO BENEFICIARY.

The rule of implied exception of the suicide risk announced in the *Ritter* case has no application where the policy is made payable to an express beneficiary. Under such circumstances the beneficiary takes by contract and not by inheritance, and the liability is fixed at the date of issuance of the policy and cannot be changed by the acts or even contract of the insured.

See *Parker vs. Des Moines Life*, 108 Iowa, 117, 78 N. W. 826.

This is the general rule. In Cooley's Briefs on Law of Insurance, Vol. IV, page 3226 the author says:

"Conceding that the rule is as stated in the *Ritter* case, when the policy is payable to the insured or his personal representatives, it is nevertheless the settled rule that where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true though the contract is that of a mutual benefit association under which the insured has the right to change the beneficiary."

This rule is supported by *Supreme Lodge Knights of Pythias vs. Kutscher*, 72 Ill. App. 462; *Supreme Lodge Knights of Pythias vs. Trebbe*, 74 Ill. App. 545; *Supreme Council Royal Arcanum vs. Pels*, 110 Ill. App. 409, affirmed in 70 N. E. 697, 209 Ill. 33; *Seiler vs. Economic Life Ass'n*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; *Parker vs. Des Moines Life Ass'n*, 108 Iowa, 117, 78 N. W. 826; *Supreme Conclave Improved Order of Heptasophs vs. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 631; *Robson vs. United Order of Foresters*, (Minn.) 100 N. W. 381; *Supreme Lodge of Sons and Daughters of Protection vs. Underwood*, 3 Neb. (Unof.) 798, 92 N. W. 1051; *Campbell vs. Supreme Conclave Improved Order of Heptasophs*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576; *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Patrick vs. Excelsior Life Ins. Co.*, 67 Barb. (N. Y.) 202; *Darrow vs. Family Fund Soc.*, 22 N. E. 1093, 116 N. Y. 537, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Mo[illegible]is vs. State Mutual Life Assur. Co.*, 39 Atl. 52, 183 Pa. 563; [illegible]*ll vs. Mutual Reserve Fund Life Ass'n*, 19 Pa. Super. Ct. [illegible]; *Patterson vs. Natural Premuim Mut. Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 8999.

Reserving the right to present a more full and complete argument on the final hearing, this preliminary brief is respectfully submitted.

S. F. PROUTY,
Attorney and Counsel for Defendant in Error.

Service this day is hereby acknowledged of the foregoing brief of the defendant in error, dated Des Moines, Iowa, June ....., 1919.

.....
Attorney and Counsel for Plaintiff in Error.

A 829

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

NO. [redacted]70

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

ISABEL H. JOHNSON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

GEORGE LINES,
SAM T. SWANSEN,
Counsel for Plaintiff in Error.

Burdick-Allen-Dietze Co., Printers, Milwaukee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

NO. 305.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

ISABEL H. JOHNSON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes to this court on a certificate of the Circuit Court of Appeals for the Eighth Circuit. In that court the Insurance Company was plaintiff in error and Isabel H. Johnson defendant in error.

It is certified by the Court of Appeals that two questions are presented by the record in that court, the decision of which is indispensable to a determination of the case and upon which it desires the instruction of this court. These questions are:

QUESTIONS.

One. Does the provision of the policy "if within two years from the date hereof said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void," there being no other provision in the

policy as to suicide, make the Company liable on the polic payable to his wife, if the assured died by his own han more than two years from the date of the policy?

Two. Is a contract of insurance on the life of a per son, which upon his death is made payable to his wife which policy makes no provision for death resulting fro suicide, if the suicide was committed more than two year after the issuance of the policy, void as being against pub lic policy? (Certificate page 2.)

STATEMENT OF FACTS.

In the certificate the following are stated as th pertinent facts:

Isabel H. Johnson instituted this action against th Insurance Company upon a policy of insurance issued b it on the life of her husband, George P. Johnson, in whic policy she was named as beneficiary.

This policy contains, among other provisions, the fo lowing:

> "If within two years from the date hereof, the sai insured shall * * * die in consequence of a duel or shall, while sane or insane, die by his own hand then, and in every such case, this policy shall be void."

There is no other provision in the policy relating t suicide.

It is alleged in the complaint that the insured died b suicide on or about the 28th day of February, 1911, whil said policy was in full force and effect.

It is undisputed that if the insured is dead, he can to his death by his own hand, and that such death occurr more than two years after the date of the policy.

There is no statement that the insured was not of sou mind when he committed suicide.

At the conclusion of the evidence the Insurance Com pany requested the trial court to direct a verdict in i

favor, upon the ground, among others, that "as a matter of law upon the whole record, if the insured is dead, he died by suicide, and it is contrary to the policy of the law as enforced by this court to allow a recovery where the insured came to his death by suicide," which request was by the court denied.

The trial court in its charge to the jury, said:

> "Did this man make away with himself on the 28th day of February, 1911? Is he dead? If he was, then this woman is entitled to recover on this policy?"

Proper exceptions were saved by the Insurance Company to the refusal of the court to direct a verdict in its favor as requested, and also to the above charge of the trial court that, if the insured made away with himself on the 28th day of February, 1911, then plaintiff is entitled to recover.

The jury returned a verdict in favor of the defendant in error, Isabel H. Johnson, the plaintiff in the trial court, upon which judgment was entered. (Certificate page 1.)

ARGUMENT.

I.

The first question certified is:

"One. Does the provision of the policy 'if within two years from the date hereof said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void,' there being no other provision in the policy as to suicide, make the Company liable on the policy payable to his wife, if the assured died by his own hand more than two years from the date of the policy?"

This question assumes that if the policy were silent on the subject of suicide, there could be no recovery under

the circumstances stated, and the precise inquiry pro-pounded by the question is whether the provision quoted from the policy changes the rule and "makes the Company liable" thereon.

1. It is undoubtedly the rule of the Federal Courts, as assumed in the question certified, that where a policy of life insurance is silent respecting liability of the company in case of suicide by the insured, death of the insured by his own hand, he being sane, is not one of the risks insured against.

Ritter vs. Mutual Life Ins. Co. (1898), 169 U. S. 139;

Hopkins vs. N. W. Life Assurance Co. (1889), 9 Fed. 729;

Mutual Life Ins. Co. vs. Kelly (1902), 114 Fed. 268;

Royal Arcanum vs. Wishart (1912), 192 Fed. 453.

So, also, death at the hands of the law as a punishment for crime is not one of the risks insured against, whether so stipulated in the policy or not.

Burt vs. Union Central Life Ins. Co. (1902), 18[illegible] U. S. 362;

N. W. Mutual Life Insurance Co. vs. McCu[illegible] (1912), 223 U. S. 234.

Nor is death at the hands of the beneficiary, assignee or other person entitled to the proceeds.

New York Mut. Life Ins. Co. vs. Armstron[illegible] (1886), 117 U. S. 591.

The decisions in these cases affirm and are based upon two fundamental principles: (first) that it is a condition of every policy of life insurance, implied if not expressed

that neither the insured nor the beneficiary shall do anything to wrongfully accelerate the maturity of the policy; and (second) that a contract by which an insurance company agreed to pay the sum stipulated in its policy upon the happening of either of the contingencies involved in the cases above cited would be contrary to public policy and void for that reason.

In *Ritter vs. Mutual Life Ins Co., supra,* this court said (pages 153-4):

> "In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract.
>
> There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of

which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such a policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind?"

In the same case this court quoted with approval (page 159) from the opinion of the Lord Chancellor in the case of *The Amicable Society, Etc., vs. Bolland,* 4 Bligh (N. S.) 194, 211, the following:

"Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present and after the events which have happened, that we can sustain such a claim? Can we, in considering this

policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

And after discussing other cases, this court said in conclusion (page 160):

> "For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered or which could legally have been covered, by the policies in suit."

In *Burt vs. Union Central Life Ins. Co., supra,* the insured was hanged pursuant to conviction and sentence for the murder of his wife, the original beneficiary in the policy sued upon. The action was brought by an assignee who derived title to a part interest in the policy under assignment from the insured and his wife, and to the remaining interest therein under assignment from the insured alone after the murder of his wife. This court said (pages 365-6):

> "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot lawfully be stipulated for."

And again (page 369):

> "There is a wagering feature in such a stipulation which forbids its being incorporated into a policy of insurance, and if it cannot be formally incorporated into the contract, its omission therefrom does not by implication give it life and validity."

Speaking of the decision in the *Ritter* case it was said (page 366):

> "We held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he in sound mind intentionally took his own life—and this irrespective of the question whether there was a stipulation in the policy to that effect or not."

In *Northwestern Mutual Life Ins. Co. vs. McCue*, *supra*, the action was brought by the heirs of the insured who had been executed for murder. Citing and quoting from the *Ritter* and *Burt* cases, this court said (page 246):

> "These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications."

Regarding the decision in the *Ritter* case, it was said (page 246):

> "There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying (page 154) that 'a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment.'"

Well reasoned decisions of state courts are in harmony with the conclusions reached in the cases above cited.

> *Supreme Commandery vs. Ainsworth*, 71 Ala. 436, 445-7;

Hartman vs. Keystone Ins. Co., 21 Pa. St. 466, 479;

Security Life Ins. Co. vs. Dillard, 117 Va. 401;

Davis vs. Supreme Council, 195 Mass. 402;

Scarborough vs. Am. Nat'l Life Ins. Co., 171 N. C. 353;

Hatch vs. Mutual Life Ins. Co., 120 Mass. 550, 552;

Bloom vs. Franklin Ins. Co., 97 Ind. 478;

Am. Nat'l Life Ins. Co. vs. Munson, 202 S. W. (Texas) 987.

2. These authorities establish not only the doctrine that death of the insured directly and intentionally caused by himself when in sound mind is not a risk intended to be covered by a policy of insurance which is silent respecting suicide, but the further doctrine that such risk is one which, on grounds of public policy, cannot lawfully be included by express stipulation.

It would seem to follow therefrom that the language quoted in Question One from the policy in suit, viz.: "If within two years from the date hereof said insured shall * * * whether sane or insane, die by his own hand then * * * this policy shall be void," cannot, as stated in the question, "make the company liable on the policy payable to his wife, if the assured died by his own hand more than two years from the date of the policy." To hold otherwise would be to say that because the parties by express stipulation in the policy have excluded the risk of suicide by the insured, whether sane or insane, during the first two years of the life of the policy, they have by implication included that risk during the subsequent years of its life. Such holding would amount to the insertion by implication after the phrase quoted in Question One of the following or equivalent words:

> "If after two years from the date hereof said insured shall die by his own hand, whether sane or insane, the company shall be liable."

But if as held in the cases above cited death of the insured directly and intentionally caused by himself when in sound mind is a risk which could not legally have been covered during the whole life of the policy, even by express stipulation to that effect, it is clear that such risk could not have been so covered during a portion of its life, and it necessarily follows that a contract to insure against such risk after two years from the date of the policy, cannot be implied from the language quoted in Question One. As said by the Lord Chancellor in *Fauntleroy's* case:

> "Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

The phrase quoted in Question One from the policy in suit clearly has a different and entirely lawful purpose and meaning. Under all the authorities the doctrine that death of the insured by his own hand is not a risk insured against applies only in case the insured was sane at the time of taking his life. The object and effect of the quoted clause is to extend during the first two years of the policy's life exclusion of the risk of suicide to cases where the insured is insane, as well as to those where he is sane at the time of taking his life. This object and effect are well expressed by Gray, Circuit Judge, in the case of *Supreme Council vs. Wishart,* 192 Fed. 453, 456, where he says:

> "By this provision, if the insured takes his own life within the period named, there is no question of sanity or insanity to be determined, because the contract in effect stipulates that, under such circumstances, there shall be no liability, whatever the condition of the insured might have been as to sanity or insanity. It would seem necessarily to follow that

cases of suicide, after the expiration of this prescribed period, must be governed by the general law of the contract to which we have above alluded, and the liability of the insurer will depend upon the sanity or insanity of the insured."

To the same effect:

Scarborough vs. Am. Nat'l Life Ins. Co., 171 N. C. 353;

Collins vs. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 356;

Am. Nat'l Life Ins. Co. vs. Munson, 202 S. W. (Texas) 987;

Bromley vs. Washington Life Ins. Co., 122 Ky. 407.

No other conclusion is consistent with the reasoning of this court in the *Ritter* case (169 U. S. 152-4) and in the other cases above cited.

3. It is immaterial that the beneficiary named in the policy in suit was the wife of the insured, instead of his executors or administrators as in the *Ritter* case. The meaning of the contract as respects the risks covered by it is not at all affected by the question who may be entitled to its proceeds. No matter who may be named as beneficiary, the right to recover upon the policy must depend upon its terms and can arise only on the death of the insured from a cause insured against.

In *Hopkins vs. Northwestern Life Assurance Co.*, 94 Fed, 729, Judge McPherson thus expresses the rule (page 731):

"* * * the terms, whether express or implied, of the contract, must control the right to recover; and, if these terms exclude the risk by which death is caused, no person whatever can have an enforceable right based upon such a death. We think it may be misleading to speak of the contract as being 'avoided' in case of suicide. Such language is often used in

policies, and finds its way thence into the decision of the courts; but it seems to be more accurate to say that the contract does not insure at all against death by suicide. It is a term of the policy, express or implied, that the assured will not die by his own wilful and deliberate act; and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured. Suicide does not 'avoid' the policy; against this event, the policy does not exist. It seems to follow that the quality and extent of the beneficiary's interest in the contract is of no importance. The question is, does the policy forbid suicide? If so, death by that act is a risk that is not insured against, and can therefore furnish no ground for recovery. The fact that the beneficiary is some other person than the insured himself cannot enlarge the scope of the contract."

In *Northwestern Mutual Life Ins. Co. vs. McCue,* 223 U. S. 234, 252, Mr. Justice McKenna, speaking for this court, says:

"It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, the policy is the measure of the rights of everybody under it, and as it does not cover death by the law there cannot be recovery either by McCue's estate or by his children."

In *Mutual Life Ins. Co. vs. Kelly,* 114 Fed. 268, 275, the Court of Appeals of the Eighth Circuit say:

"It seems to us that if there be an implied agreement on the part of every insured not to intentionally kill himself for the purpose of enforcing the liability under a policy—and such, in our opinion, is the rule laid down in *Ritter vs. Insurance Co., supra*—such agreement inheres in and forms a part of the contract, and is as much a condition to liability as if it were written out into an express agreement; and, that being so, for the reasons already pointed out a third party, claiming under such a policy of insurance made

for her benefit, ratifies and adopts the implied as well as the express conditions and limitations of the contract."

See also:

Davis vs. Supreme Council, 195 Mass. 402;
Security Life Ins. Co. vs. Dillard, 117 Va. 401;
Scarborough vs. Am. Nat'l Life Ins. Co., 171 N. C. 353.

4. In the certificate of the Court of Appeals it is stated that

"The complaint alleges that he (the insured) died by suicide on or about the 28th day of February, 1911"

and further that

"It is undisputed that * * * if he (the insured) is dead that he came to his death by his own hand."

There is no suggestion that the insured was not of sound mind at the time he took his life. It must be presumed, therefore, that he was sane.

"The presumption of sanity is not overthrown by the act of committing suicide."
Ritter vs. Mutual Life Ins. Co., 169 U. S. 139, 147.

"There is no reason why the mere fact of suicide should remove the presumption of sanity which obtains in all cases where human conduct is under investigation."
Supreme Council vs. Wishart, 192 Fed. 453, 457.

"There is no averment or proof that the insured was insane, and the presumption of sanity must, therefore, prevail."
Hopkins vs. Northwestern Life Assurance Co., 94 Fed. 728, 730.

For the foregoing reasons we contend that the first question certified should be answered in the negative.

II.

The second question certified is:

"Two. Is a contract of insurance on the life of a person, which upon his death is made payable to his wife, which policy makes no provision for death resulting from suicide, if the suicide was committed more than two years after the issuance of the policy, void as being against public policy?"

In discussing the first question certified we have argued that death of the insured by suicide—intentional self-destruction while sane—is a risk not covered by a policy "which makes no provision for death resulting from suicide," i. e. is silent concerning the same. If this contention be sound, it necessarily follows that such a policy is not void, for, in such case, death by suicide being excluded from the risks covered by the policy, its validity as a contract respecting the risks included therein is not in any way affected. If the insured in such a policy, being sane, takes his own life, the beneficiary, whether the executor of the insured, his wife, or any other person, is denied recovery on the policy, not because the policy is void, but because death of the insured by suicide is not one of the risks insured against.

This conclusion is not affected by the fact that the policy contains a provision like that in the policy here in suit, to-wit:

> "If within two years from the date hereof, the said insured shall * * * while sane or insane, die by his own hand * * * this policy shall be void."

This provision cannot by implication make suicide of the insured while sane one of the risks insured against,

after the expiration of the two year period, when an express stipulation to that effect, being contrary to public policy, would be void. As the authorities hereinbefore cited show, the purpose and effect of the two year provision above quoted is to further limit, not to enlarge, the risk assumed. We submit, therefore, that Question Two should be answered in the negative.

If, however, it is deemed that from the provision in the policy just quoted it is to be implied that death of the insured by suicide, while sane, after the expiration of two years from the date of the policy is one of the risks covered by it, then we say that under the decisions of this court and the weight of well-considered authorities elsewhere the policy is void to that extent, and Question Two should be answered accordingly.

Respectfully submitted,

GEORGE LINES,
SAM T. SWANSEN,

Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1919.

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THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error.*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR

S. F. PROUTY,
Counsel for Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1919.

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THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error.*

vs.

ISABEL H. JOHNSON, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR

The record as certified presents the following questions for discussion and determination.

1. Should the question as to the defense of suicide have been raised by answer, or was it properly raised by a filing of a motion for directed verdict at the close of the evidence?
2. Does the provision in the policy cited cover the risk of suicide, sane or insane, after two years from the date of its issuance?
3. Is the express assumption of the risk of suicide after a reasonable stated period void as against public policy?
4. Can an insurance company issue a policy covering suicide and collect a premium therefor and then declare that provision of the policy void without returning or offering to return the premium collected?
5. If such a policy is void when payable to the insured himself, or his personal representative, would it be void if made payable to his wife as beneficiary?

We will discuss these questions in the order named.

Counsel for plaintiff in error now claim that an express provision covering the risk of suicide is, or would be void as

against public policy. And the first thing for determination is whether such a question could be properly raised for the first time in a motion for directed verdict, or whether it should have been raised by a proper pleading that such a provision was void or voidable. This raises a question of procedure.

This is a law action and was brought in the District Court of Polk County, Iowa, and transferred by plaintiff in error to the Federal Court and was tried in the Southern District, Central Division of Iowa. Under the Federal statutes the forms and modes of procedure are governed by the laws of Iowa.

Section 914 of the Federal Statutes, Vol. 4, page 563 provides:

> "The practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Court, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in courts of record of the State within such Circuit or District are held, any rule of court to the contrary notwithstanding."

This leads us to consider how and in what manner the question of the voidability of this provision of the policy could have been raised under the laws of Iowa.

Section 3629 of the Code of Iowa provides:

> "Matters Specifically Pleaded:
>
> Any defense showing that a contract written or oral, or any instrument sued on, is void or voidable, * * * must be specifically pleaded."

Counsel for plaintiff in error are now claiming that notwithstanding the fact that the policy expressly covered the risk of suicide after two years, that this provision of the policy is void as against public policy. If such was their claim or contention below they ought under the statutes of Iowa to have pleaded it. There may be some question in other jurisdictions as to the manner in which this question could be raised, but there is no question under the statutes and decisions of Iowa. Counsel for defendant below did not raise this question by any pleading nor in manner during the trial of

the case. They denied that the insured was dead or had died by suicide as claimed by plaintiff below. They never raised the question in any way until they offered the motion for a directed verdict at the close of the trial. They cannot raise such a question in this way under the forms of procedure prescribed in Iowa.

In the case of *Reich vs. Booch*, 68 Iowa, page 526, this question is decided. That was a case where the contract was made on Sunday, which, under the statutes of Iowa, on account of public policy, is declared void and not enforcible. The evidence tended to show that the contract in controversy was made on Sunday and consequently void. The Court says:

> "There was evidence tending to prove that the contract under which plaintiff performed the labor for which he seeks to recover, was entered into between parties on Sunday. Defendant asked the court to instruct the jury that if they found that the contract was entered into on Sunday, their verdict should be for defendant. The court refused to give this instruction, and told the jury that they need not consider that claim, or the evidence which tended to prove that the contract was entered into on Sunday. Defendant assigned these rulings as error. We think they are correct. The defense which defendant sought to establish by the evidence was that the contract under which the services were rendered was illegal, and consequently void. Our statute (Code Sec. 2718) (now 3629) requires that defendant did not plead that defense in his answer. He denied the terms of the agreement were as alleged by plaintiff, but he made no averment as to the legality of the contract. Under the pleadings he was clearly not entitled to have the question as to its legality submitted to the jury."

Under the contention of counsel for plaintiff in error, in their argument when it appeared to the court that this was an illegal contract, it was the duty of the court to stop proceedings and dismiss plaintiff's cause of action because no rights could be based on such a contract. But the court held, and rightfully, under the statute, that if defendant wished to raise that question, it must be done in the pleadings, so as to advise the other party of the issue to be tendered.

The question is also decided in *Shawyer vs. Chamberlain*, 113 Iowa, page 742. This was a case in which it appeared that part of the goods sold were intoxicating liquors, and under the statute and prior decisions of Iowa, such contract was absolutely null and void. It appeared in the evidence that such intoxicating liquors were a part of the stock of goods transferred, and the party sought to forfeit the contract on that ground, but had not plead it. The court says (page 744):

> "The record discloses that the stock included intoxicating liquors valued at $164.34. The defendant urges that because of this the contract was void, under Section 2423 of the Code, See *Lindt vs. Uihlein*, 109 Iowa, 591. But any defense showing that a contract written or oral, * * * is void or voidable, * * * must be specially pleaded. Section 3529, Code; *Reich vs. Bolch*, 68 Iowa, 526; *Glidden vs. Hibgee*, 31 Iowa 379. No such issue was presented by the answer until the verdict had been returned. Nor does the record show the trial to have proceeded on that theory. The evidence of intoxicating liquors came out in proving the cost price of the stock, as bearing on the measure of damages; and the court, in overruling the motion to direct verdict at close of plaintiff's evidence, distinctly rejected the attempt to inject that issue when not properly plead. In the instruction submitting the interrogatory as to whether liquors were included in the stock, the jury was told not to allow that fact any influence in determining the case."

So, clearly under the statute and decisions of Iowa, if counsel for plaintiff in error had desired to raise that question, they should have done so in their pleading; but instead of allegating suicide and claiming that thereby the policy was forfeited, and that the incontestable clause as to suicide was void as against public policy, they went to trial upon the sole issue of whether or not he was dead or had absconded.

The commonest principle in pleading requires that if one has an issue upon which he relies, he should tender it in his pleadings, or at least in the course of the trial. If suicide as a defense had been tendered by the answer, it would then have given plaintiff below an opportunity to avoid by alleging and showing that the party was insane at the time of the suicide, but by tendering no issue, no preparation could be

made to show that fact. So by law and equity, they ought to have raised this issue before the completion of the trial, and not having done so, they are certainly estopped from doing it in the manner they did.

So this preliminary question of pleading should first be determined by this court. If the defense of suicide was not properly raised, there is no occasion to consider the other questions certified.

CONSTRUCTION OF THE PROVISION OF THE POLICY.

The second question is "Does the provision in the policy cited cover the risk of suicide, sane or insane, after the expiration of two years from the date of issuance?"

The policy in suit provides:

> "If within two years from the date hereof the said insured * * * shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be null and void."

There are two elementary principles of law that will assist in interpreting its meaning and force.

1. Insurance policies being unilateral contracts, will be construed most strictly against the insurer.

2. That where there is an express exclusion of one thing, it expressly includes other things not excepted. This policy clearly excepts the risk of suicide, sane or insane, during two years and therefore as expressly includes such risk after two years.

This is a settled rule in the construction of such provisions. See *Goodwin vs. Provident Life Insurance Company*, 97 Iowa 226; 32 L. R. A. 473; *Supreme Court of Honor vs. Updegraff*, 68 Kans. 474; *Mutual Reserve Fund Life Ass'n*, 32 S. W., 52; *Royal Circle vs. Achterworth*, 204 Ill. 549; 63 L. R. A. 452; *Clement vs. New York Life*, 42 L. R. A. 247; Cooley's Briefs on the Law of Insurance, Vol. 4, page 3229, and authorities there cited. *Thompson vs. Phoenix Insurance Company*, 136 U. S. 287; *National Bank vs. Insurance Company*, 95 U. S. 673; *Mouler vs. Insurance Company*, 111 U. S. 335; *Wadsworth vs. Tradesman Company*, 132 New York 550; *Fitch vs. Insurance Company*, 59 N. Y. 557.

In the case of *Goodwin vs. Provident Life Insurance Company* above cited there was a provision in the policy similar to the one under consideration. The court (page 233) says:

> "The tenets established for the guidance of courts in such matters, are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted."
>
> "Now, by the terms of the policy it was incontestable, after two years from its date, subject, however, to the stipulations regarding payment of premiums, and extra-hazardous occupations. That is to say, claims under the policy by reason of the death of the assured, were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. * * * Defendant's counsel contend with much plausibility that death by suicide was a risk not contemplated by the parties, nor covered by the policy. But we think such a holding would import into the terms of a policy something not found therein, and not contemplated by the parties, at least not by the assured, at the time the policy was issued. And, as said in the *Wadsworth* case, 'We should adopt that construction which we think the insurer had reason to suppose was understood by the insured.' The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide, occurring within two years from the date of its delivery, but that after two years it is incontestable except upon the grounds stated therein. * * * We are the better satisfied with this conclusion, because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide, to a fixed period, and make their policies incontestable on that ground thereafter."

In Cooley's Brief above cited, the author says:

> "The policy may contain a stipulation to the effect that after it has been in force a certain number of years it shall be incontestable, except for fraud in procuring it. Where the policy also contains a provision declaring suicide an excepted risk, the effect of the incontestable clause is substantially to convert the suicide clause into a limited exception and to render the insurer liable where death by suicide occurs after the time limited in the incontestable clause."

There should be no contention or chance for contention but that after two years the company intended to make the insured believe that the contract carried the risk of suicide, sane or insane, but counsel for plaintiff in error claim that such a construction would render the policy void as against public policy.

That leads us to discuss the question of public policy as set out in the third proposition.

IS THE RISK OF SUICIDE PROHIBITED BY LAW AS AGAINST PUBLIC POLICY?

Is the express assumption of the risk of suicide after a stipulated period void as against public policy? Public policy is, or should be, determined by universal practice. It is now the almost universal practice of large insurance companies to issue policies similar to the one at bar covering the risk of suicide after a time limited. The Handy Guide of 1918, issued by the Spector Company, gives, or purports to give, the forms of policies by all the substantial Life Insurance Companies of the United States. From this it will appear that practically all Life Insurance Companies are now issuing policies covering the risk of suicide either from the time of issuance or after a definite period. This is common knowledge. Among which may be named:

Aetna Life Ins. Co.	incontestable	after	1	year	
American Central Life Ins.	"	"	"	"	
Bankers Life Ins. Co.	"	"	"	"	
Equitable Life Assurance Co.	"	"	"	"	
Federal Life Ins. Co.	"	"	2	years	

Federal Mutual Life Ins. Co.	"	"	" "
First National Life Ins. Co.	"	"	1 year
Gibraltar Life Ins. Co.	"	"	" "
Connecticut General Life	"	"	" "
Connecticut Mutual Life	"	"	" "
Home Life Ins. Co.	"	"	" "
Metropolitan Life Ins. Co.	"	"	2 years
Mutual Benefit Life Ins. Co.	"	"	1 year
Mutual Life Ins. Co. of N. Y.	"	"	2 years
National Life Ins. Co.	"	"	1 year
N. W. Mutual Life Ins. Co.	"	"	" "
Pacific Mutual Life Ins. Co.	"	"	" "
Penn Mutual Life Ins. Co.	"	"	" "
Phoenix Mutual Life Ins. Co.	"	"	" "
Provident Life and Trust Co.	"	"	" "
Prudential Ins. Co.	"	"	" "
Scranton Life Ins. Co.	"	"	" "
Security Mutual Life	"	"	" "
State Life Ins. Co.	"	"	" "
Travelers Ins. Co.	"	"	" "
Union Mutual Life Ins. Co.	"	"	" "
West Coast-San Francisco	"	"	" "

All the state courts that have been called upon to pass upon the question have sustained these provisions and held the companies liable for suicidal deaths after the time limited.

See:

Simpson vs. Life Ins. Co., 115 N. C. 393; 20 S. E. 517; *Steele vs. St. Louis Mut. L. Ins. Co.*, 3 Mo. App. 207; 2 Bacon, Ben. Soc. 694, Sec. 340a; *Mareck vs. Mutual Reserve Fund Life Asso.*, 62 Minn., 39, 54 Am. St. Rep. 613, 64 N. W. 68; *Goodwin vs. Provident Sav. Life Assur. Asso.*, 97 Iowa, 226; 32 L. R. A., 473, 59 Am. St. Rep. 411, 66 N. W. 157; *United Life Ins. Asso.*, 68 Hun. 144, 22 N. Y. Supp. 626, affirmed without opinion in 142 N. Y. 677, 37 N. E. 824; *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 570, 17 Am. Rep. 372; *Murray vs. State vs. State Mut. L. Ins. Co.*, 22 R. I. 524, 53 L. R. A., 742, 48 Atl. 800; *Wright vs. Mutual Ben. Life Asso.*, 118 N. Y. 237, 6 L. R. A., 731, 16 Am. St. Rep. 749, 23 N. E. 186; *Kline vs. National Ben. Asso.*, 111 Ind., 462, 60 Am. Rep. 703, 11 N. E. 620; *(Mutual Reserve Fund Life Asso. vs.*

Payne, (Tex. Civ. App.), 32 S. W. 1063); *Patterson vs. Natural Premium Mut. Life Ins. Co.*, 100 Wis., 118, 42 L. R. A., 253, 69 Am. St. Rep. 899, 75 N. W. 980; *Brady vs. Prudential Ins. Co.*, 168 Pa. 645, 32 Atl. 102; 19 Am. and Eng. Enc. Law, 2d Ed., p. 80; 2 Bacon, Ben. Soc., Sec. 340; 3 Joyce, Ins. 2581, Sec. 2644.

RITTER CASE.

It is claimed, however, that this court in the case of *Ritter vs. The Mutual Life Ins. Co.*, 169 U. S., 139, has held that insurance companies have no right to assume the risk of suicide by a sane person, and that if they do assume such risk, it would be void as against public policy. It may be conceded that there is language in that case justifying this contention. A careful analysis of that case will show, however, that no such question was in fact involved in it, and that what was said by the Learned Court on that subject was pure *dictum* and not *stare decisis*.

1. The policy in the *Ritter* case contained no express provision covering the risk of suicide, nor made any reference thereto.

2. In the application there was an express warranty against suicide.

3. It was shown that the assured fraudulently contemplated suicide at the time of the taking out of the policies.

4. The policies were all payable to legal representatives.

5. It was alleged and proved that the insured contemplated suicide at the time of taking out the policies and that he fraudulently committed suicide in the furtherance of that design.

No such questions are involved in the case at bar. When properly interpreted this policy contains the risk of suicide after two years. The policy was taken out more than sixteen years before the act which would negative fraudulent intent. At the time of taking out the policy the equities in the *Ritter* case were in favor of the insurance company. But not so in the case at bar. The policy is made payable to the wife. She has committed no wrong. The insurance company has collected the premiums for covering this risk and still holds them and is now contending that she has no indemnity. The equities in the *Ritter* case would naturally induce a court of

equity to find some way of relieving against such fraud and injustice as was there attempted.

This court in the *Ritter* case does not, however, decide the broad question whether all policies are void that assume the risk of suicide. The language used by the court and relied upon by counsel was simply used in deciding the main issue involved. The question rightly decided by the *Ritter* case is whether or not as a presumption of law, a policy silent on the subject includes or excludes death by suicide, but does not decide the question as to whether such policy would be void if it expressly covered the risk. This question is now for the first time squarely before this court. The *Ritter* case has thrown much confusion into the law on this subject and it should be now settled once and for all whether or not insurance companies may issue policies covering said risk, collect the premium therefor, and issue void or voidable policies. The *Ritter* case was decided more than twenty-five years ago when the public policy concerning insurance companies and the risks that they intended or could assume, was very much different from what it is today. If the *Ritter* case is construed, as counsel for plaintiff in error contend, then there can be no assumption of the risk of suicide and we should therefore discuss on very broad lines the question involved.

From the court decisions and text writers we detect a very interesting development of the policy on this subject. In the older policies there is found no provision as to the effect of suicide. Some of the courts held that the risk of suicide was excluded, others that it was included because not expressly excepted. To avoid this confusion of decisions, insurance companies adopted the general practice of issuing policies excepting suicide. The courts generally construed this provision of the policy as only covering death by suicide when sane. But this again led to confusion of decisions. Then the insurance companies issued policies excluding the risk of suicide whether "sane or insane." Public sentiment revolted against this harsh provision. Insurance companies found it was injuring their business and creating a strong public sentiment against them. To avoid this, most of the insurance companies adopted the plan of excepting the risk of suicide for a limited period sufficiently long to relieve it of any presumption that the person who took out the policy, at the time contemplated suicide, by covering the risk after that period. This policy has

been generally accepted by the public as being fair and reasonable.

The question now squarely before the court is whether or not such crystallization of public sentiment is contrary to public policy and consequently void.

PUBLIC POLICY.

Public policy is a shifting one. What may be against public policy at one time may not be at another. The states may declare or change their public policy by statute, by decisions of its courts and official rulings and actions of its departments. The announcement in the *Ritter* case as to the public policy of allowing insurance companies to cover this risk was made nearly a quarter of a century ago, and before the modern policy was generally used, and before public policy had been crystallized on this subject. Now for more than twenty years these policies have been in general use. Every state in the Union has permitted the insurance companies to issue them and collect premium therefor. Every state court has sustained them as not being against public policy. Some of the states have gone so far as to prohibit the defense of suicide even when the policy expressly provides that such act voids the policy. What higher or clearer expression of public policy can be found? It must be conceded that the states that create and control insurance companies should declare the public policy rather than the Federal government that can neither create nor control them.

No policies can be issued in any state of the union, except its form be approved by its insurance department. These departments have uniformly allowed policies covering the risk after a time limited. The states have put their stamps of approval upon such forms. The states have adopted the policy of allowing such policies to be issued to their citizens, and allowed the insurance companies to collect the premium therefor. It would create a strange situation if these policies should be adopted and approved by the state powers and all overthrown by the decisions of the Federal Court. We feel sure that there is nothing in the *Ritter* case that justifies this court in announcing so drastic a rule as contended for by counsel for plaintiff in error. The question of the power of the states to adopt their own public policy was recently before this court in the cases of *Knight Templars vs. Jarman*, 187 U.

S. 197, and in *Whitfield vs. Aetna Insurance Company*, 205 U. S. 489. The state of Missouri passed a statute preventing insurance companies from pleading the defense of suicide except where it was shown to the satisfaction of the court and jury that the party contemplated suicide at the time of the taking out of the policy. This statute was assailed in this court as being in conflict with the doctrine announced in the *Ritter* case. It was claimed that it "encouraged suicide." In the latter case the court in passing upon the question, said:

> "That the statute is a legitimate exertion of power by the state cannot be successfully disputed. Indeed the contrary is not asserted in this case, although it is suggested that the statute seemingly 'encourages suicide and offers a bounty therefor payable not out of the funds of the state, but out of the funds of the insurance company.'
>
> There is some foundation for this suggestion in the former decisions of this court in which it was held that public policy even in the absence of a prohibitory statute would forbid a recovery upon a life policy *silent* as to suicide where the insured while in sound mind willfully and deliberately took his own life. *Ritter vs. Mut. Ins. Co.*, 169 U. S. 139; but the determination of the present case depends upon other conditions than those involved in the *Ritter* case. The insurance company is not bound to make a contract which is attended by the risks indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it will not for that reason alone be disregarded for it is the province of the state by its legislature to adopt such policy as it deems best, provided it does not in doing so come in conflict with the constitution of the state or of the constitution of the United States. There is no such conflict here. The legislative will within the limits stated must be respected if all that can be said is that in the opinion of the court the statute expressing that will is unwise from the point of public policy."

Now, it will be noted that the effect of the statute in controversy compels all insurance companies organized or doing business in the state of Missouri to carry the suicide risk whether they contract to do so or not. This court holds that this is not contrary to public policy, but expressly holds that the state can adopt its own policy. Now, if it is not contrary to public policy for a state to force an insurance company to carry a suicide risk, by what sound reasoning could it be held that it is contrary to public policy for a state to allow insurance companies to expressly cover that risk? Missouri, as a legislative expression of this public policy, has declared that insurance companies must carry this risk. All the states, by the rulings of their Insurance Department have allowed insurance companies to cover this risk and collect premium therefor, and their highest courts have held them liable thereon. By what sound argument, or judicial discrimination could the public policy of Missouri be sustained by this court and the public policy of other states be declared void? It would be equivalent to saying that a state may force the carrying of this risk, but may not allow it. The reasoning in these cases seem to us as an express repudiation or reversal of the dictum in the *Ritter* case wherein the court declared that it is contrary to public policy to allow an insurance company to cover this risk. Would there be any question that if a policy was issued to a citizen of Missouri containing an express assumption of this risk that it would be valid and enforceable? If not, why not? Missouri has declared its public policy and this court in these cases have recognized its right so to do. Why cannot other states declare their public policy and have it recognized and sustained by this court? Public policy can be evinced by the uniform manner of doing business as well as by statute. If all the states have allowed insurance companies to assume this risk and collect premium therefor and this has been uniformly sustained by the highest courts, why does that not establish a public policy for the state? By what sound reasoning can this court say that such a clause in a Missouri policy does not tend to the commission of crime and is not void as to public policy, and yet declare that a like clause in a policy issued in another state tends to the commission of crime and is therefore void as against public policy. The reasoning of these cases cannot be harmonized with the dictum found in the *Ritter* case, except upon the theory that this court recog-

nizes the right of every state to adopt its own "public policy" on this subject.

It will appear from the authorities already cited that in the state of Wisconsin, where this policy was issued, in the state of Kansas, where it was delivered, in the state of Iowa, where the suit was brought, and in the state of Maryland, the domicile of the deceased, insurance companies have a right to insure against the risk of suicide, and the courts of these states have all declared the companies liable thereon. These states by their highest court have all declared the public policy on this question. Under the rule announced in the *Whitefield* case above cited, this court should follow the public policy of the state, and not declare a public policy of its own.

IMPORTANCE OF THE QUESTIONS CERTIFIED.

As practically all of the insurance companies doing business in this country have for the last twenty years been issuing policies covering the risk of suicide, and have been permitted by the states to issue them and collect premium therefor, it becomes a great question of public policy as to the status of these policies. Policies now outstanding cover billions of risks and involve millions of premiums paid for the risks. All of these policies have been issued under the sanctions of the states. Will this court now declare a rule of law that will render these policies void as to the insured, but valid as to insurance companies so that they can defeat recovery and yet hold the vast premiums collected for covering such risks? Will this court now adopt a rule that will unsettle this vast business?

PAYABLE TO BENEFICIARY.

The rule of implied exception of the suicide risk announced in the *Ritter* case has no application where the policy is made payable to express beneficiary. Under such circumstances the beneficiary takes by contract and not by inheritance, and the liability is fixed at the date of issuance of the policy and can not be changed by the acts or even contract of the insured.

See *Parker vs. Des Moines Life*, 108 Iowa, 117, 78 N. W. 826.

This is the general rule. In Cooley's Brief on Law of Insurance, Vol. 4, page 3226, the author says:

> "Conceding that the rule is as stated in the *Ritter* case, when the policy is payable to the insured or his personal representatives, it is nevertheless the settled rule that where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true though the contract is that of a mutual benefit association under which the insured has the right to change the beneficiary."

This rule is supported by *Supreme Lodge Knights of Pythias vs. Kutscher*, 72 Ill. App. 462; *Supreme Lodge Knights of Pythias vs. Trebbe*, 74 Ill. App. 545; *Supreme Council Royal Arcanum vs. Pels*, 110 Ill. App. 409, affirmed in 70 N. E. 697, 209 Ill. 33; *Seiler vs. Economic Life Ass'n*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; *Parker vs. Des Moines Life Ass'n*, 108 Iowa, 117, 78 N. W. 826; *Supreme Conclave Improved Order of Heptasophs vs. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 631; *Robson vs. United Order of Foresters*, (Minn.) 100 N. W. 381; *Supreme Lodge of Sons and Daughters of Protection vs. Underwood*, 3 Neb. (Unof.) 798, 92 N. W. 1051; *Campbell vs. Supreme Conclave Improved Order of Heptasophs*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576; *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Patrick vs. Excelsior Life Ins. Co.*, 67 Barb. (N. Y.) 202; *Darrow vs. Family Fund Soc.*, 22 N. E. 1093, 116 N. Y. 537, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Morris vs. State Mutual Life Assur. Co.*, 39 Atl. 52, 183 Pa. 563; *Hall vs. Mutual Reserve Fund Life Ass'n*, 19 Pa. Super. Ct. 31; *Patterson vs. Natural Premium Mut. Life Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 8999.

COMPANY ESTOPPED TO DENY LIABILITY.

Can an insurance company issue a policy covering a prohibited risk and collect the premium therefor and then declare the policy void without returning, or offering to return, the premiums collected?

It is too plain to admit of serious argument that an insurance company cannot collect the premium for covering a specified risk and then plead that such contract is void; at least without returning, or offering to return, the premiums collected. Otherwise it would allow an insurance company to take advantage of its own fraud. If the contract is void now, it was void when issued by the company and it would be presumed to know that fact. If the contention of plaintiff in error is correct it could therefore collect and hold the consideration and at the same time deny its liability. This, under the authorities, cannot be done.

Judge Cooley, in his Briefs on the Laws of Insurance, Vol. one, page 610 says:

> "In accordance with the general rule that estoppel may arise from the acceptance and retention of benefits is the principle that an insurer, *by receiving and retaining the premiums* on a contract of insurance, is estopped to deny its power to issue the policy or that liability attached thereunder." And cites in support of the doctrine *Lockwood vs. Middlesex Mutual Assur. Co.*, 47 Conn. 553; *Insurance Co. of North America vs. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Esch vs. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Watts vs. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441; *Powell vs. Factors' & Traders' Ins. Co.*, 28 La. Ann. 19; *Hoge vs. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939.

In the case at bar the company collected in premiums for sixteen years covering the risk of suicide, sane or insane, after two years. Counsel for plaintiff in error is now claiming that such provision of the policy is void and the company still holds the premium collected for covering this risk. No court ought to tolerate such a situation, and especially this court that announces the highest law of the land.

BRIEF REVIEW OF AUTHORITIES CITED BY COUNSEL FOR PLAINTIFF IN ERROR.

A careful analysis of the authorities cited by plaintiff in error will show that there is no case, either State or Federal, in which the courts have held that where the policy contained

an expressed or clearly implied assumption of the risk of suicide that it was contrary to public policy.

We have heretofore cited the decisions of the Supreme Courts of various states holding that insurance companies are liable on the assumed risk of suicide, and a careful analysis of the Federal decisions will show that that question has never been squarely presented and decided by the Federal Courts.

The case of *Ritter vs. Mutual Life Insurance Company*, 169 U. S. 139, is mainly relied upon by plaintiff in error as sustaining their contention. We have already discussed that case quite fully, but again call attention to the fact that that was a case in which the policy was *silent* on the subject and the policy was made payable to the insured or his legal representatives. There was also an express provision in the application warranting against taking of the life of the insured by his own hands. The application in that case contained this provision:

> "I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years." Page 143.

In *Hopkins vs. Northwestern Life Co.*, 94 Fed. page 729, there was also a provision of warranty in the policy as follows:

> "If the insured shall die by his own hand, or act, whether sane or insane, within two years from the date of this policy * * * then this policy shall be void and cease to be binding upon said company, except for the amount which the insurer had paid in premiums on account thereof."
>
> "In March, 1898, Mr. Hopkins killed himself, the death occurring within two years from the date of policy. The company tendered before suit, and had paid into court the premiums paid by the insured."

This is certainly easily distinguishable from the case at bar.

In the case of *Mutual Life Ins. Co. vs. Kelly*, 114 Fed. 268, the court merely construes the policy and application. There

was an express warranty against suicide for two years. The application contained this provision:

> "I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years."

The policy contained a provision that after two years from date thereof, "the only conditions which would be binding upon the holder of this policy are that he shall pay the premiums." It was held:

> "That the effect of such mutual covenants fairly and reasonably construed, was to make the agreement against suicide a condition to the company's liability for the period of two years, and to show that the death of the insured by suicide, sane or insane, within two years was a risk not assumed by the company."

The court on page 281 says:

> "Applying the rule governing the interpretation of contracts, hereinbefore referred to, and seeking to give a reasonable interpretation of the clause now under consideration, consonant with a manifest intention of parties as disclosed by all the provisions of the policy, we can only reach one conclusion; that the insured, Kelly, not only agreed that he would not die by his own act, whether sane or insane, within the period of two years, but in effect agreed, as already stated, that the risk actually assumed by the company excluded death by suicide within two years. The facts of the case do not warrant the application of the rule rendering contracts void which are impossible performance and so known by both parties to it."

This case clearly holds to the doctrine contended for by defendant in error that the policy in suit, by its construction, should exclude the risk of suicide for two years, but assume it thereafter.

The case of *Burt vs. Union Central Life Ins. Co.*, 187 U. S. 362, is not a case involving the question of suicide. That was

a case where the insured met death by execution as a result of murder.

The case of *N. W. Mutual Life Ins. Co. vs. McCue*, 223 U. S. 234, is of the same character.

These cases are in harmony with the general current of decisions so far as we have been able to ascertain by diligent search. There is no court that has allowed or sustained the issuance of a policy covering the risk of death by execution for murder. But on the other hand we find no case in any of the state courts holding that the inclusion of the risk of suicide is void as against public policy. There is a clear distinction made in all cases, both State and Federal, between the assumption of the one risk and the other.

The case of *N. Y. Mutual Life Ins. Co. vs. Armstrong*, 117 U. S., 591, is not at all in point. That case simply holds that the beneficiary cannot recover when he has been guilty of taking the life of the assured.

Respectfully submitted,

S. F. PROUTY,
Counsel for Defendant in Error.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. 877, 30[redacted]71

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT,

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 24, 1919.

(26,963)

(26,963)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.

1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5251.

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, Plaintiff in Error,

vs.

A. M. MILLER, Administrator of the Estate of George P. Johnson, Deceased, Defendant in Error.

Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit, hereby certifies that the record on a writ of error now pending before it discloses the following:

The defendant, administrator of the estate of George P. Johnson, instituted this suit against the plaintiff in error to recover the amount of a policy issued by the plaintiff in error on the life of George P. Johnson, made payable upon the receipt of proper proofs of his death, to the executors, administrators or assigns of the insured. The policy of insurance contains the following provision: "This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid." There is no provision in this policy concerning death by his own hand, or by suicide.

The alleged death of the assured occurred more than one year after the date of the policy. It is undisputed that the assured, if
2 dead, died by his own hand and while sane.

At the conclusion of the evidence the plaintiff in error requested the court to direct a verdict in its favor, assigning among other grounds the following: "That if the insured, George P. Johnson, is dead, and if he died prior to March 3, 1911, the only permissible inference upon the whole record is that he came to his death by suicide, which is the claim of the plaintiff, and that hence under the policy sued on no recovery can be allowed on account of the death of the insured being caused in that manner." The court overruled the motion of the plaintiff in error and proper exceptions were saved to the ruling of the court.

The court submitted two special interrogatories, as follows: "1. Do you find that the insured George P. Johnson is dead? 2. Do you find that the insured George P. Johnson committed suicide prior to March 3, 1911?" Both of these interrogatories were answered by the jury affirmatively, and the jury also returned a general verdict in favor of the defendant in error, the plaintiff in the court below.

The plaintiff in error filed a motion for judgment on the special findings, alleging as grounds therefor, that the finding of the jury that the assured came to his death by suicide entitles it to judgment in its favor, as regardless of the contract of insurance it is contrary to public policy to permit a recovery against an insurer on a life insurance policy which, by its terms, is payable to the executors,
3 administrators or assigns of the insured where the death of the insured was caused by the deliberate and premeditated suicide. The motion was by the court denied and proper exceptions saved and assigned as error in the assignment of errors.

It is further certified that the following questions of law are presented by the writ of error prosecuted by the defendant in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon them.

1. Does the provision of the policy that "this contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid," there being no provision in the policy concerning suicide, if the assured dies by his own hand more than one year from the date of the issue of the policy, prevent the insurer from denying liability, if the assured came to his death by his own hand and in the absence of any showing that he was insane at the time?

2. Is a contract of insurance on the life of a person which makes no exception for death resulting from suicide against public policy, and therefore void?

3. If the answer to the second question is in the affirmative, is there any distinction between policies made payable to the wife of the assured or to his executors, administrators and assigns, or are they in either event void as being against public policy?

WILLIAM C. HOOK,
Circuit Judge;

JACOB TRIEBER,
District Judge,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Sitting in this Case.

4 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error, vs. A. M. Miller, Administrator of the Estate of George P. Johnson, Deceased, No. 5251, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this fourth day of February, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

5 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, December Term, 1918. No. 5251. National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error, vs. A. M. Miller, Administrator of the Estate of George P. Johnson, Deceased. Certificate of Questions to the Supreme Court of the United States. Filed Feb. 4, 1919. E. E. Koch, Clerk.

Endorsed on cover: File No. 26,963. U. S. Circuit Court Appeals, 8th Circuit. Term No. 877. National Life Insurance Company of Montpelier, Vermont, vs. A. M. Miller, administrator of the estate of George P. Johnson, deceased. (Certificate.) Filed February 24th, 1919. File No. 26,963.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877. 1919 71

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION AND PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE NATIONAL LIFE INSURANCE COMPANY, TOGETHER WITH BRIEF IN SUPPORT THEREOF, NOTICE OF MOTION AND STIPULATION OF COUNSEL.

GEORGE B. YOUNG,
Attorney and Counsel for The National Life Insurance Company, Plaintiff in Error.

EUGENE D. PERRY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877.

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION.

Comes now the National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error in the above entitled cause, by George B. Young, its attorney and counsel, and moves this Honorable Court to enter an order requiring that the Honorable, the Circuit Court of Appeals for the Eighth Circuit certify the whole record in the above entitled cause to this Court for its review and determination, and that a writ of certiorari or other process issue, directed to said Circuit Court of Appeals, in order that the whole of said record may be so certified, and to that end it now tenders herewith its petition and brief in support thereof, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

.....Geo. B. Young.....
Attorney and Counsel for National Life Insurance Company of Montpelier Vermont, Plaintiff in Error.

EUGENE D. PERRY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877.

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

NOTICE.

TO A. M. MILLER, Administrator of the Estate of George P. Johnson, Deceased, Defendant in Error in the above entitled cause:

You are hereby notified that the National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error in the above entitled cause, will on Monday, the 6th day of October, 1919, upon its verified petition and a copy of the entire record in said cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for a writ of certiorari and brief in support thereof is herewith served upon you) to the Supreme Court of the United States in its Court Room in Washington, D. C.

Geo. F. Young

Attorney and Counsel for National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error.

Service is this day hereby acknowledged of the foregoing notice of motion and copy of motion and petition for a writ of certiorari, and brief in support thereof.

Dated this ..26.... day of ....May....., 1919.

.....S. F. Prouty.....

Attorney and Counsel for A. M. Miller, Administrator of the Estate of George P. Johnson, Deceased, Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877.

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION AND STIPULATION FOR CERTIFICATION OF COMPLETE RECORD.

Come now the parties to the above entitled cause, The National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error, by George B. Young, its attorney and counsel, and A. M. Miller, Administrator of the Estate of George P. Johnson, Defendant in Error, by S. F. Prouty, his attorney and counsel, and state to the Honorable, the Supreme Court of the United States, that the questions herein certified cannot be properly presented by counsel nor fully determined by this Court without a complete record of the case as the same was made, presented and appears in the said Circuit Court of Appeals.

WHEREFORE, they most respectfully pray this Court to enter an order requiring the Honorable, the Circuit Court of Appeals for the Eighth Circuit to certify the whole record in the above entitled cause to this Court for its review and determination, not only of the questions of law certified but as well of the errors of law assigned, and that a writ of certiorari or other process issue, directed to said Circuit Court of Appeals, in order that the whole of said record may be so certi-

fied, to the end that said cause may be fully heard and finally determined in this Court.

.....Geo. P. Young.....
Attorney and Counsel for the National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error.

.....S. F. Prouty.....
Attorney and Counsel for A. M. Miller, Administrator of the Estate of George P. Johnson, Intervenor, Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877.

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE SAID CIRCUIT COURT OF APPEALS TO CERTIFY TO THIS COURT, FOR ITS CONSIDERATION, REVIEW AND DETERMINATION, THE WHOLE RECORD IN SAID CAUSE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the National Life Insurance Company of Montpelier, Vermont, respectfully shows to the Court as follows:

1. On July 23, 1917, Isabel H. Johnson, Isabel Johnson and George Johnson, residents and citizens of the State of Iowa, filed their petition in the District Court of Iowa in and for Polk County, against the National Life Insurance Company, of Montpelier, Vermont, a Vermont corporation and a resident and citizen of that State, on a policy of life insurance in the sum of $5,000.00, issued by said Company to, upon the life of, George P. Johnson, husband of said Isabel H., and father of said Isabel and George Johnson, plaintiffs in the action.

The policy was by its terms payable "to the Executors, Administrators or Assigns of the Insured." It was issued March 2, 1907, in Maryland, and was a Maryland contract.

2. The petition of said plaintiffs alleged: The issuance of the policy; that George P. Johnson, the insured, died intestate on February 28, 1911; that no administration had ever been taken out upon his estate in Iowa or elsewhere; that the plaintiffs were the surviving widow and only heirs at law, respectively, of the insured; the giving of proofs of death; the Company's refusal to pay; and concluded with a prayer for judgment. A copy of the policy was subjoined to the petition. Touching death by suicide the policy is silent. It contained, however, a so-called "incontestable clause," as follows:

> "This Contract Shall Be Incontestable after one year from the date of its issue, provided the required premiums are duly paid."

3. Thereafter on the petition of defendant the cause was duly removed to the United States District Court for the Southern District of Iowa.

4. Thereafter A. M. Miller, as administrator of the estate of George P. Johnson, by leave of Court filed in said cause his petition of intervention, therein alleging:

That he was administrator of the Estate of George P. Johnson, the insured, acting as such by appointment of the District Court of Iowa in and for Polk County; that he adopted as his own all the allegations in the petition of the plaintiffs, but claimed that only he, as administrator, and not the plaintiffs as widow and heirs of the insured, could maintain the action on the policy.

5. Thereafter the Company filed its answer to said petition of intervention, therein admitting and alleging:

That it was a Vermont corporation and a resident and citizen of that State; that during all the times mentioned it was licensed to do, and was doing business in the States of Vermont, Maryland, Iowa, and elsewhere in the United States; that it issued in Maryland to George P. Johnson the policy of insurance sued on; that the insured, had paid the annual premiums on the policy due in 1909 and 1910 by borrowing on the policy from the Company; that the premium due March 2, 1911, was not paid and the policy thereupon lapsed and the cash reserve, less said policy indebtedness, became automatically converted into $130.00 term insurance for a period named.

That at and from the time of the issuance of the policy on March 2, 1907, continuously to the time of his supposed death, George P. Johnson, the insured, was a resident and citizen of the State of Maryland, domiciled in the City of Baltimore in said State. That at the time of his supposed decease he was heavily indebted to residents of Maryland and others in an amount to exceed $14,000.00, which indebtedness has never

been paid and that he is still owing the same. That under the laws of the State of Maryland, where the insured was domiciled, the proceeds of a policy of life insurance, payable to the executors, administrators or assigns of the insured, are not upon his death exempt assets, but are liable to the satisfaction of the claims of the creditors of the insured's estate. That under the laws of Maryland there is no limitation upon the time within which administration may be taken out upon the estate of a decedent, and that as yet no administration has been taken out in the State of Maryland upon the estate of the insured.

That George P. Johnson, the insured, never resided in the State of Iowa, and did not at, or at any time prior to, his supposed decease, have or own any property of any kind within the State of Iowa; that long after the supposed death of Johnson the plaintiffs, being his wife and children, left their domicile in the City of Baltimore in the State of Maryland, and removed to the City of Chicago, in the State of Illinois, where they resided until the fall of 1913, when they removed to the City of Des Moines, in the State of Iowa, where they have since resided.

That on or about December 13, 1917, the plaintiffs wrongfully made application to the District Court of Iowa, in and for Polk County, for the appointment of an administrator upon the estate of said George P. Johnson, therein stating that said insured deceased at a time and place to them unknown; that he left personal property of about the value of $50.00 which had been brought into the State of Iowa since his decease; that thereupon an order was entered in said Polk District Court appointing said A. M. Miller administrator of the estate of said George P. Johnson and fixing the amount of his bond at $100.00. That on December 22, 1917, said intervenor, A. M. Miller, filed in said Polk District Court an inventory of the estate of said supposed decedent, listing the assets of his estate as follows, to wit:

> "Household Goods of the said George P. Johnson now in the possession of his wife at the Victoria Hotel in Des Moines, Polk County, Iowa, consisting of beds and bedding, pictures and frames, books, mahogany desk, family silver, colonial cut glass, one trunk marked 'G. P. J.', one set gold shirt studs, one ring and one Remington typewriter."

That all of the above described property was brought from the State of Maryland into the State of Iowa by the plaintiffs in the latter part of the year 1913, more than two years after the alleged death of said insured. That said probate proceedings in said Polk District Court were merely colorable, factitious and for the purpose merely of securing colorable Iowa

administration upon the estate of said insured, as a supposed decedent, to the end and so that the intervenor, as a colorable Iowa Administrator, might and should intervene herein as a party plaintiff in the action against this defendant on said policy; and that thereby the recovery thereon, if any, might be had in the State of Iowa, under the laws of which all such life insurance funds and proceeds are exempt from the claims of creditors of the deceased.

And defendant states that to permit the said A. M. Miller to intervene herein, and to maintain the suit brought on said policy as a supposed administrator of said insured, is a fraud upon the rights of the creditors of said insured, who, by the laws of Maryland where said contract of insurance was made, and where the insured was domiciled at the time of his alleged death, are of right entitled to the entire proceeds due upon said policy, save and except only the sum of $500.00, which is exempt. And that by reason of the premises the Maryland creditors of said insured may yet take out administration upon his estate, if he be deceased, in the Courts of Maryland, and cause the Maryland Administrator thereby appointed to bring action in the Maryland Courts against defendant upon the said policy of insurance now in suit, and thereby subject the defendant to a double liability thereon.

6. Thereafter said A. M. Miller, administrator of the estate of George P. Johnson, filed his reply to said answer, in which he alleged:

That he denied all allegations of the said answer not admitted; that he admitted that at the time of his decease George P. Johnson, the insured, was heavily indebted substantially as alleged by the defendant; denied that under the laws of the State of Maryland the avails of a policy of life insurance payable to the estate of the insured were upon the latter's death liable to the payment of the debts owing by insured's estate.

7. Thereafter the cause came duly on for trial, and the plaintiffs, Isabel H. Johnson, wife, and Isabel Johnson, daughter, and George Johnson, son of the insured, in open court conceded that Miller as administrator only, and not the plaintiffs as widow and heirs of the insured, could maintain the action, and the plaintiffs thereupon waived all right to maintain the action in their names, and the cause was dismissed as to them personally, and continued in the name of Miller as administrator. (Rec. p. 36.)

Trial was thereupon had to the Court and a jury.

8. The evidence is conclusive upon the following points:

That at the time of the supposed decease of George P. Johnson, the insured, and for about five years continuously prior thereto, said Johnson was a citizen and resident of the State of Maryland, being domiciled in the City of Baltimore in said State. His family consisted of his wife, Isabel H., his

daughter Isabel and his son, George Johnson.

George P. Johnson never resided in the State of Iowa and at the time of his death owned no property or estate of any description within the State of Iowa.

The policy sued on was issued by the Company in the State of Maryland; all premiums ever paid thereon were paid the Company in the State of Maryland; the premiums due thereon in 1909 and 1910 were paid by the insured borrowing from the Company on policy notes secured by the cash reserve apportioned to the policy. The notes were never paid. The premium due March 2, 1911, was never paid, on account of which the policy thereupon lapsed and, according to its terms, the indebtedness standing against the policy was subtracted from the then cash reserve apportioned to the policy and the remainder applied to the purchase of paid-up term insurance in the sum of $130.00 which extended to April 10, 1918.

At the time of his death George P. Johnson was an embezzler and was utterly insolvent. He was owing in excess of $14,000.00. He left his wife and family in Baltimore destitute.

On March 11, 1911, Mrs. Isabel H. Johnson and family removed from Baltimore, in the State of Maryland, to Chicago, in the State of Illinois; removing thence in the fall of 1913 to Des Moines, in the State of Iowa, where they have since resided. In their migrations they took with them certain household and personal effects belonging to George P. Johnson, the insured, the value of which they laid at $50.00. These migratory chattels were brought with them upon their removal to Iowa in the fall of 1913. It was upon these effects that Iowa administration upon the estate of Johnson was asked and obtained.

Johnson, the insured, had a safety deposit box in the vaults of the Safe Deposit & Trust Company at Baltimore, Maryland. On January 13, 1912, access was obtained to this box. In it was found the policy in question; also other policies of life insurance in which Mrs. Johnson was named as beneficiary. The latter were given to Mrs. Johnson, but the former, being payable to *Johnson's estate*, was held by the Safe Deposit & Trust Company, to protect the rights of possible creditors. (Rec. pp. 61, 62.) None of the original plaintiffs to this action, nor Miller, as Iowa administrator of his estate, has ever seen or had the policy in suit. It still is, where it continuously has been since some time prior to Johnson's death, in possession of the Safe Deposit & Trust Company at Baltimore, in the State of Maryland, awaiting the rightful custody of a domiciliary administrator. (Rec. pp. 61, 62, 84, 85.)

No administration has ever been taken out upon Johnson's estate in the State of Maryland or elsewhere, except only in Polk County, Iowa, by Miller the intervenor herein, on Decem-

ber 13, 1917, (Rec. pp. 4, 46, 102). There is no statute of Maryland limiting the time within which administration upon the estate of a decedent may be taken out. (Rec. p. 102.)

Under the law of Iowa insurance payable to the estate of the insured upon the insured's death is exempt from the claims of the creditors of his estate.

Evidence was offered by the Company but not received, tending to show that in the State of Maryland the law is otherwise.

There is nothing in the record tending to show that Johnson, the insured, was not of sound mind.

The evidence tended to show that he committed suicide, while of sane mind, on February 28, 1911.

9. The defendant moved for a directed verdict at the close of all the evidence upon the ground, amongst others, that the insured died by suicide, which motion was overruled. The same question was also presented by requests for instructions, (Rec. pp. 111, 115). The court charged the jury that (Rec. p. 121)—

> "Under the evidence in this case there is no question that this man either did commit suicide or that he absconded. One of the two."

And put the ultimate issue to the jury in the form of two questions, (Rec. p. 122):

> "Did he commit suicide? Or did he abscond?"

The court refused to hold that, under the law as administered by the Federal Courts, suicide was a defense and charged that it was not a defense; but submitted a special interrogatory to the jury on the question, (Rec. p. 124). The jury returned a special verdict that the insured, George P. Johnson, committed suicide on or about February 28, 1911, (Rec. pp. 35, 125-126), and a general verdict in favor of the administrator. The defendant thereupon moved to set aside the general verdict and to render judgment in favor of defendant on the special finding that Johnson committed suicide (Rec. pp. 35, 128), which motion the court overruled.

10. Judgment was entered on the general verdict against the National Life Insurance Company. Said Company thereupon caused said cause to be removed by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit; wherein said cause was duly argued by counsel for the respective parties and submitted on December 11, 1918.

11. On February 4, 1919, the Judges sitting in said Circuit Court of Appeals, differing in opinion as to the rules of law applicable to said cause, signed a certificate in which were made findings of fact and certain requests for instruction by

this Court relative to certain questions of law, all of which more distinctly appears by the certificate signed by said Judges and duly filed in this Court.

12. A certified copy of the entire record in said Circuit Court of Appeals is herewith furnished as part of this application in conformity with Rule 37 of this Court relative to causes brought from the Circuit Court of Appeals, and said record is marked "Exhibit 'A' ".

13. Your petitioner believes that the questions certified to this Court by said Circuit Court of Appeals do not fairly or correctly state the issues of law presented by the record of said cause; that the questions as certified are misleading, and as stated in said certificate were not tendered or presented by the record, and that by them justice is denied petitioner; and that the importance to the answers to the questions propounded in said certificate largely depends upon the State of the record as actually made, and that proper answer to said questions cannot as your petitioner believes, be made except upon an understanding of the whole record.

14. That among the questions of law actually raised in the submission of said cause in said Circuit Court of Appeals, as will be fully disclosed by the record therein, are the following:

(1) Whether suicide is a good defense to an action on a life insurance policy where, more than three years after its issuance, the insured committed suicide; the policy by its terms being payable "to the executors, administrators or assigns of the insured;" there being no reference in the policy to death by suicide, but the policy providing, "this contract shall be incontestable after one year from the date of its issue, providing the required premiums are paid."

(2) Whether in a life insurance policy, payable to the excutors, administrators or assigns of the insured, a provision declaring "this contract shall be incontestable after one year from the date of its issue, providing the required premiums are duly paid," prevents the Company from insisting upon the defense of suicide where, in an action on the policy, it appears that the insured committed suicide more than three years after the date of the policy.

(3) Whether suicide is a good defense to an action brought by the administrator of the deceased, insured, on a life insurance policy payable to the executors, administrators or assigns of the insured, which policy contains no reference to death by suicide, but does provide that "this contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid," where it affirmatively appears that more than three years after the issuance of the policy the in-

sured by his own wilful and deliberate act, being of sane mind, committed suicide.

(4) Whether in a life insurance policy, by its terms payable to the executors, administrators or assigns of the insured, a provision that "this policy shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid," amounts in law, as between the parties, to a licensing of suicide after that period; that is to say, whether, where the insured committed suicide more than three years after the date of the policy, the Company has the right to avail itself of the defense of suicide.

(5) Whether in an action on a life insurance policy, in which the beneficiary is "the executors, administrators or assigns of the insured," where it affirmatively appears that the insured, being of sane mind, committed suicide, irrespective of the provisions of the policy the defense of suicide inheres in the case.

(6) Whether in a policy of life insurance payable "to the executors, administrators or assigns of the insured," the law implies that the insured, will not die by his own wilful and deliberate act; and, therefore, if he does die by such act while in sound mind, his life is terminated by a risk against which the Company has not insured.

15. That divers other questions of law, duly presented by assignments of error, inhere in the record of said cause, the decision of which by this Court is of great interest to all life insurance companies doing business within the United States and to all persons insured therein or affected thereby. That among such questions of law are the following:

The National Life Insurance Company, a Vermont corporation and a citizen and resident of that State, was at all times licensed to do, and was doing, a life insurance business in the States of Vermont, Maryland, Iowa and elsewhere in the United States. George P. Johnson, a citizen and resident of the State of Maryland, applied for a policy of insurance upon his life in said Company. The Company issued the policy and delivered it to Johnson in the State of Maryland. The policy was payable to the executors, administrators or assigns of the insured. Johnson died insolvent, a resident of the State of Maryland, owing large sums to residents of Maryland and others. His only assets, aside from the policy in question, consisted of a few household goods and personal effects of trifling value. Johnson was never a resident of the State of Iowa, and at his death owned no property and had no goods or effects in the State of Iowa. He died intestate. After his death his wife and family removed from the State of Maryland to the State of Illinois; and thence removed to

the State of Iowa where they have since resided. They brought with them into Iowa the household goods and personal effects of Johnson above mentioned. No administration has ever been taken out upon Johnson's estate in the State of Maryland or elsewhere, except only in the State of Iowa where more than five years after his death, on the application of his widow to the District Court of Iowa for the county where *she* resided, administration was granted upon the goods of Johnson, brought by her into Iowa more than two years after his decease. The policy of life insurance has remained and is in the custody and possession of a trust company in the State of Maryland where it was left by Johnson in his lifetime for safe-keeping, and the Iowa administrator has never had possession of it. Under the laws of Maryland there is no limitation upon the time within which administration may be taken out upon the estate of a decedent in that State. The Iowa administrator sues the Insurance Company in Iowa on said policy of insurance.

(1) Under the facts above stated is the situs of the debt for the purpose of administration in the State of Maryland or in the State of Iowa?

(2) Under the facts above stated has the Iowa administrator title to the cause of action sued on; that is to say, is the cause of action on the policy a legal demand in the hands of the administrator appointed by the Iowa Court?

(3) Upon the death of Johnson, where was the situs of the debt for the purpose of administration and of suit?

(4) If the situs of the debt was on the death of Johnson in the State of Maryland, which was his domicile, is it still there?

(5) If the Court is advised that the debt for the purpose of administration and suit is now in the State of Iowa, how, when and by what token was it transferred from the State of Maryland to the State of Iowa, so as to lodge in the Iowa administration?

(6) If under the laws of the State of Maryland the proceeds of the policy in question are liable in the hands of a Maryland administrator to the claims of creditors of Johnson's estate, while under the laws of the State of Iowa the proceeds are exempt from all claims of such creditors, is the situation changed?

WHEREFORE, your petitioner, the National Life Insurance Company of Montpelier, Vermont, respectfully prays:

That an order be entered, requiring that the whole record and case be sent up to this Court for its consideration, and that the whole matter in controversy may be reviewed and decided as if it had been brought to this Court by writ of

error, and that a writ of certiorari may be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in the said cause therein entitled, "The National Life Insurance Company, Plaintiff in Error, vs. A. M. Miller, Administrator of the Estate of George P. Johnson, Intervenor, Defendant in Error, Law No. 5251," to the end that said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," now carried forward into Section 239 of the Judicial Code; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem meet and in conformity with said Act; and that said cause may be heard in this Court as if brought here by writ of error.

NATIONAL LIFE INSURANCE COMPANY,

BY Geo. B. Young.....

STATE OF VERMONT, COUNTY OF WASHINGTON, SS:

BE IT REMEMBERED: That on this ..23..1.. day of May, 1919, before me, the undersigned, a Notary Public in and for said County personally appeared George B. Young, who being by me first duly sworn upon his oath deposed and said: That he has read the foregoing petition by him subscribed, and knows the contents thereof; that he was duly authorized by the said, the National Life Insurance Company and signed the said petition by its authority and in its behalf; that the allegations in said petition are true, except as to matters therein stated to be upon information and belief, and as to such matters he believes it to be true.

John. C.. Cattanach.....
Notary Public in and for said County.

My Commission expires .January 31, 1920

(Seal.)

IN THE

SUPREME COURT OF THE UNITED STATES

Number 877.

(OCTOBER TERM, 1918.)

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *Plaintiff in Error,*

vs.

A. M. MILLER ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON. DECEASED, *Defendant in Error.*

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

I.

This petition is made under Section 239 of the Judicial Code. The Circuit Court of Appeals for the Eighth Circuit, desiring the instruction of this Court on several propositions of law, made a certificate which was filed in this Court on or about February 24, 1919, and made certain findings of fact in order that the questions certified might be understood.

The questions propounded in the certificate are:

1. Does the provision of the policy that "this contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid," there being no provision in the policy concerning suicide, if the assured dies by his own hand more than one year from the date of the issue of the policy, prevent the insurer from denying liability, if the assured came to his death by his own hand and in the absence of any showing that he was insane at the time?

2. Is a contract of insurance on the life of a person which makes no exception for death resulting from suicide against public policy, and therefore void?

3. If the answer to the second question is in the affirmative, is there any distinction between policies made payable to the wife of the assured or to his executors, administrators and

assigns, or are they in either event void as being against public policy?

Your petitioner believes that the questions in the precise form in which they are framed are, in certain particulars, misleading; that certain of said questions contained in said certificate do not, as your petitioner believes, arise under the record; and that by them justice is denied petitioner in this:

(1) Question "1" in said certificate is misleading, in that it does not state what specific defenses the Company set up and sought to rely upon. Obviously the insurer, notwithstanding an incontestable clause, is not "prevented from denying liability":

> On the ground that the plaintiff has not title to the cause of action (which was one of the defenses set up by the Company in the case at bar); or
>
> On the ground that the insured is not dead but had merely absconded (which the Company contended was true, the jury finding otherwise); or
>
> On the ground that the evidence tending to show death (by suicide) was for certain reasons inadmissible, and that a judgment founded upon such inadmissible evidence should be reversed.

The ground implied, though not expressed in Question "1", on which the Company "denied liability," was that the insured while in sound mind committed suicide. The Company contended that death of the insured by suicide, he being of sane mind, was a risk not insured against and that could not be insured against. The question presented for decision was whether the incontestable clause prevented the Company from insisting upon *the defense of suicide.*

(2) Question "2" in said certificate is misleading in this: It was not contended in said Circuit Court of Appeals, as implied in said question, that the policy of insurance which made "no exception for death resulting from suicide (was) *against public policy, and therefore void.*" It was conceded that the policy was a *valid* contract. But it was contended by the Company that it is a term of this policy, and of every policy of life insurance, implied if not expressed, that the insured shall not die by his own wilful and deliberate act; and, therefore, if he does die by such act, being of sane mind, his life is terminated by a risk against which the Company has not insured.

(3) Since the policy in question was by its terms payable "to the executors, administrators or assigns of the insured," the relevancy of the distinction sought to be made in Question "3" between policies so payable and those payable to the wife of the insured, is not apparent. In any event it was not contended that the policy was void but only that the death of the

insured by suicide, while sane, was a risk not covered or attempted to be covered or that could have been covered by the policy in suit.

II.

It is a term of every policy of life insurance, implied if not expressed, that the insured shall not die by his own wilful and deliberate act; and, therefore, if he does die by such act, being of sane mind, his life is terminated by a risk against which the Company has not insured.

Ritter v. Mutual Life Insurance Co., (1898) 169 U. S. 139;

Hopkins v. Northwestern Life Assurance Co., (1899) 94 Fed. 729;

Mutual Life Insurance Co. v. Kelly, (1902) 114 Fed. 268, 275, 52 C. C. A. 160;

Supreme Council of Royal Arcanum v. Wishart, (1912) 192 Fed. 453, 112 C. C. A. 591.

Compare:

Burt v. Union Central Life Insurance Co., (1902) 187 U. S. 362;

Northwestern Mutual Life Insurance Co. v. McCue, (1912) 223 U. S. 234.

III.

The incontestable clause in no manner impairs the defense of suicide.

Ritter v. Mutual Life Insurance Co., (1898) 169 U. S. 139, loc. cit. 154;

Scarborough v. American National Life Insurance Co., (1916) 171 N. C. 353, 88 S. E. 482, L. R. A. 1918 A, 896, Ann. Cas. 1917 D, 1181 (death at the hands of the law);

American National Insurance Co. v. Munson, (Tex. Civ. App. 1918) 202 S. W. 987 (same);

Bromley v. Washington Life Insurance Co., (1906) 122 Ky. 407, 92 S. W. 17, 5 L. R. A. (N. S.) 747 (want of insurable interest);

Anctil v. Manufacturers' Life Insurance Co., (1899) App. Cas. 604 (same).

IV.

Miller, as Iowa administrator of the Estate of Johnson, had not title to the cause of action on the policy, nor the right to maintain the same.

Insurance Company v. Lewis, (1878) 95 U. S. 682;
Moore v. Jordan, (1887) 36 Kas. 274, 13 Pac. 337, 339, 59 Am. Rep. 552;
Ellis v. Northwestern Mutual Life Insurance Co., (1897) 100 Tenn. 177, 43 S. W. 766.

It is hoped that the foregoing is an indication of some of the reasons impelling petitioner to make application for a review of the case upon the whole record. It is impossible, within the limits to be observed in discussing an application of this kind, to set forth any considerable part of the complicated facts involved in the controversy, or do more than indicate the difficult questions of law arising upon the record.

It is believed that the questions in the precise form as stated in the certificate are not, in the respects pointed out, fairly stated as regards the rights of your petitioner, and further that complete justice can be done only if the whole record is before the Court for its examination and review.

All of which is respectfully submitted.

Geo. B. Young
Attorney for Counsel for The National Life Insurance Company of Montpelier, Vermont, Plaintiff in Error.

Eugene D. Perry
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 306 71

NATIONAL LIFE INSURANCE COMPANY (of Montpelier, Vermont)
Plaintiff in Error

vs.

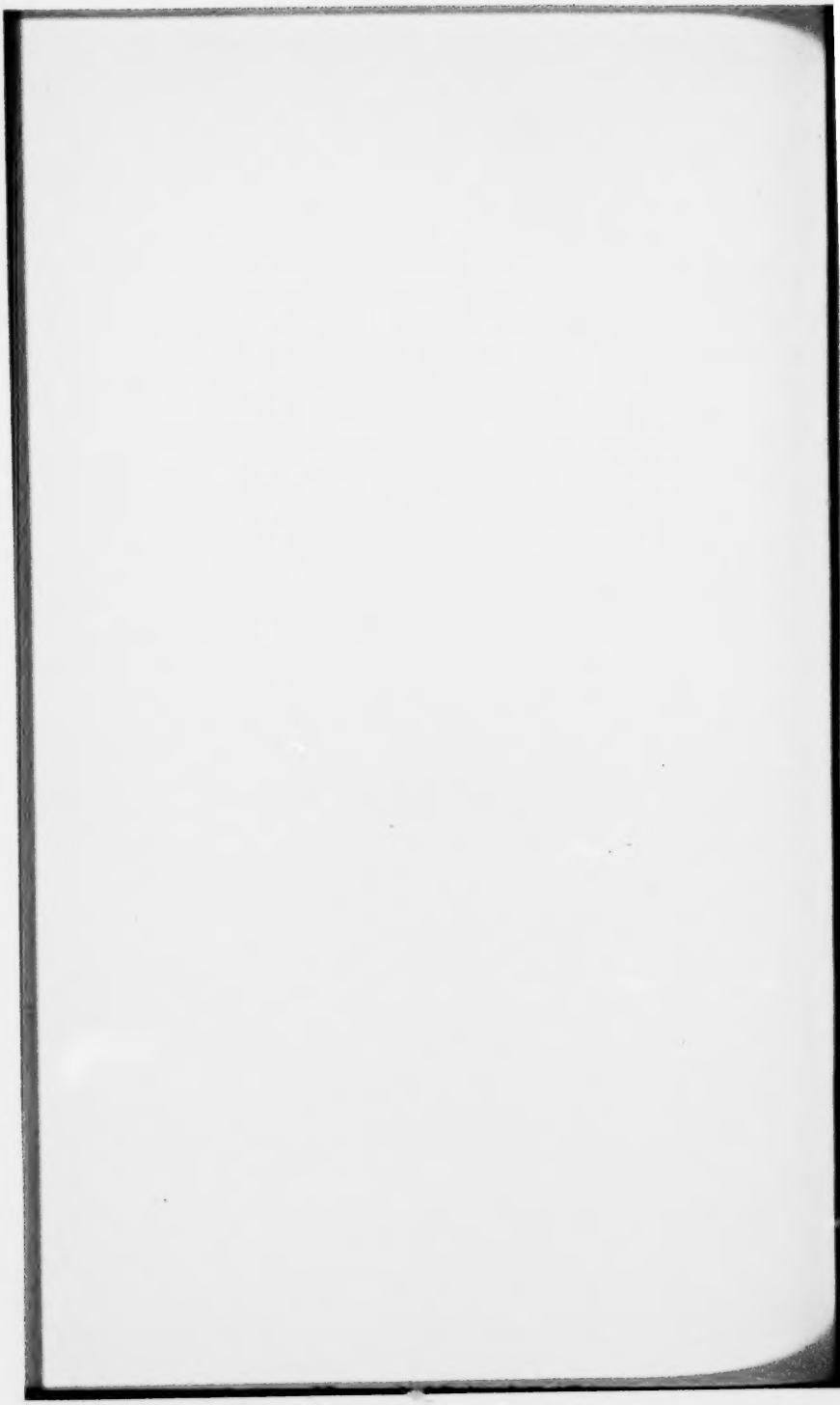
A. M. MILLER, ADMR. OF THE ESTATE OF GEORGE P. JOHNSON, Deceased,
Defendant in Error

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF FOR PLAINTIFF IN ERROR

In support of the contention that a policy of life insurance does not insure against the risk of death by suicide or self-destruction of the assured while sane.

GEORGE B. YOUNG
E. D. PERRY
GUY B. HORTON
Counsel for Plaintiff in Error



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 306

NATIONAL LIFE INSURANCE COMPANY
(of Montpelier, Vermont)
Plaintiff in Error

vs.

A. M. MILLER, ADMINISTRATOR OF THE ESTATE OF GEORGE P. JOHNSON, Deceased
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR

This action, originally brought by defendant in error, comes here from the Circuit Court of Appeals for the Eighth Circuit on a Certificate presenting three questions for the instructions of this Court. These questions relate to the effect of suicide by the assured, and of the incontestable clause in the policy, upon the rights of the parties under the contract.

STATEMENT OF CASE

The action is based upon a life insurance policy issued by National Life Insurance Company to, and on the life of, George P. Johnson and payable to his executors, administrators, or assigns. The policy provided that

> "This contract shall be incontestable after one year from the date of its issue provided the required premiums are duly paid." (Certificate, p. 1., f. 1).

As appears by the certificate there is no provision in the policy concerning death of the assured by his own hand or by suicide. In response to special interrogatories the jury found that more than one year after the issue of the policy said George P. Johnson died by suicide. There was no evidence tending to show the insanity of assured and

> "It is undisputed that assured, if dead, died by his own hand and while sane." (Certificate, p. 1., f. 1-2).

At the conclusion of the evidence plaintiff in error requested the court to direct a verdict in its favor, assigning, among other grounds,

> "That if the insured, George P. Johnson, is dead, and if he died prior to March 3, 1911, the only permissible inference upon the whole record is that he came to his death by suicide, which is the claim of the plaintiff, and that hence under the policy sued on no recovery can be allowed on account of the death of the insured being caused in that manner." (Certificate, p. 1., f. 2).

The motion was overruled. Proper exceptions were taken.

QUESTIONS CERTIFIED

The three questions submitted by the Circuit Court of Appeals on which it requests instructions from this Court are:

> "1. Does the provision of the policy that 'this contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid,' there being no provision in the policy concerning suicide, if the assured dies by his own hand more than one year from the date of the issue of the policy, prevent the insurer from denying liability, if the assured came to his death by his own hand and in the absence of any showing that he was insane at the time?
>
> "2. Is a contract of insurance on the life of a person which makes no exception for death resulting from suicide against public policy, and therefore void?
>
> "3. If the answer to the second question is in the affirmative, is there any distinction between policies made payable to the wife of the assured or to his executors, administrators and assigns, or are they in either event void as being against public policy?"
>
> (Certificate, p. 2, f. 3.)

ANSWERS TO CERTIFIED QUESTIONS

Plaintiff in error respectfully submits that the foregoing questions are properly answered, and should be answered by this Court, in substance as follows:

Answer to Question 1. No, because the contract of insurance did not, and could not, legally, extend to or cover the risk of death

of assured by suicide or self-destruction, while sane. Against that risk there is no insurance contract.

Answer to Question 2. No. Against the risk of suicide the policy does not exist, and for death of assured from such cause there is no liability. The contract described in this question contains an implied obligation on the part of the assured to do nothing to wrongfully accelerate the maturity of the policy and, so interpreted, the contract is valid and not against public policy.

If such condition did *not* exist, the contract *would* contravene public policy as to insurance against suicide and be null and void in that particular. The risk of suicide or self-destruction by assured, while sane, cannot legally be covered by an insurance contract.

Answer to Question 3. Under the contract described in Question 2 death of assured by suicide or self-destruction, while sane, is not a risk assumed by insurer, but such risk is, and legally must be, excluded. The rights of all persons under the contract are determined by the terms of the contract, express or implied, and the conditions which the law implies are as binding upon all persons as though expressed. Consequently, under such contract, there can be no recovery by the executors, administrators or assigns of assured or by any designated beneficiary, for death from such cause. Against such risk no contract exists.

POINTS AND AUTHORITIES

1. It is contrary to public policy to insure against the results of crime or misdemeanors.

Travelers Ins. Co. vs. *Seaver*, 86 U. S. 531, 22 L. Ed. 155;
Mutual Life Ins. Co. vs. *Armstrong*, 117 U. S. 591, 29 L. Ed. 997;
Supreme Lodge K. of P. vs. *Beck*, 181 U. S. 49, 45 L. Ed. 741;
Burt vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216;
Northwestern Mutual Life Ins. Co. vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419;
Amicable Society vs. *Boland*, 4 Bligh. N. S. 194, (211);
Supreme Commandery K. of G. R. vs. *Ainsworth*, 71 Ala. 436;
Metropolitan Life Ins. Co. vs. *Shane*, 98 Ark. 132, (138), 135 S. W. 836, (839);
Hatch vs. *Mutual Life Ins. Co.*, 120 Mass. 550, (552);
Wells vs. *New Eng. Mutual Life Ins. Co.*, 191 Pa. St. 207, 43 Atl. 126;
Accident Ins. Co. of No. America vs. *Bennett*, 90 Tenn. 256, 16 S. W. 723.

2. It is contrary to public policy to permit insurance against death from acts in violation of law or by legal execution for crime.

Burt vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216;
Northwestern Mutual Life Ins. Co. vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419;
Bloom vs. *Franklin Life Ins. Co.*, 97 Ind. 478;
Wolf vs. *Conn. Mutual Life Ins. Co.*, 5 Mo. App. 236;

Murray vs. *New York Life Ins. Co.*, 96 N. Y. 614;
Scarborough vs. *American National Ins. Co.*, 171 N. C. 353.

3. No one shall be permitted to profit by his own fraud or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy and have their foundation in universal law administered in all civilized countries.

Box vs. Lanier, 112 Tenn. 393, 79 S. W. 1042.

4. Suicide is a crime and *malum in se*.

4 *Blackstone Commentaries* 189.
Rex vs. *Tyson, Russ. & R. C. C.*, 523;
Commonwealth vs. *Bowen*, 13 Mass. 356;
Commonwealth vs. *Mink*, 123 Mass. 422;
May vs. *Pennell*, 101 Me. 516;
Burnett vs. *People*, 204 Ill. 208;
Mallory vs. *Travelers Ins. Co.*, 47 N. Y. 54, (56).

5. An insurance contract may not legally cover the risk of self-destruction or suicide by the assured, while sane.

Mutual Life Ins. Co. vs. *Terry*, 82 U. S. 580, 21 L. Ed. 236;
Travelers Ins. Co. vs. *McConkey*, 127 U. S. 661, 32 L. Ed. 308;
Ritter vs. *Mutual Life Ins. Co.*, 69 Fed. 505;
Ritter vs. *Mutual Life Ins. Co.*, 169 U. S. 139, 42 L. Ed. 693.

6. An insurance contract which has no express reference to suicide contains an implied condition excepting suicide or self-destruction, while sane, from the risks assumed. As to such risk no contract exists.

Ritter vs. *Mutual Life Ins. Co.*, 169 U. S. 139, 42 L. Ed. 693;
Ritter vs. *Mutual Life Ins. Co.*, 69 Fed. 505;
Burt vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216;
Northwestern Mutual Life Ins. Co. vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419;
Hopkins vs. *Northwestern Life Assurance Co.*, 94 Fed. 729; S. C. 99 Fed. 199;
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Shipman vs. *Protected Home Circle*, 174 N. Y. 398;
Hartman vs. *Keystone Ins. Co.*, 21 Pa. St. 466 (479);
Plunkett vs. *Supreme Conclave, Heptasophs*, 105 Va. 643, 55 S. E. 9;
Supreme Conclave, Heptasophs vs. *Rehan*, 119 Md. 92, 85 Atl. 1035.

7. The rights of all parties to an insurance contract are determined by the terms of the policy—express or implied—and no one can recover thereon except in accordance with the terms of such contract.

Mutual Life Ins. Co. vs. *Terry*, 82 U. S. 580, 21 L. Ed. 236;
Mutual Life Ins. Co. vs. *Armstrong*, 117 U. S. 591, 29 L. Ed. 997;
Burt vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216;
Northwestern Mutual Life Ins. Co. vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419;
Hopkins vs. *Northwestern Assurance Co.*, 94 Fed. 729; S. C. 99 Fed. 199;
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Schmidt vs. *National Life Ass'n*, 102 Ia. 44;
McDonald vs. *Mutual Life Ins. Co.*, 178 Ia. 863;
Pitt vs. *Berkshire Life Ins. Co.*, 100 Mass. 500 (503);
Davis vs. *Royal Arcanum*, 195 Mass. 402, 81 N. E. 294.

8. A benefit to one's estate is, in legal contemplation, the same as a benefit to one's self.

Sohm's Institutes of Roman Law, Ledlie, 3rd Ed. pp. 501-5;
1 *Woerner American Law of Administration Secs.* 10, 11.

9. Therefore, since one may not benefit by his own wrongful act, there can be no recovery under a life insurance contract by the executors, administrators, or assigns of assured, where assured dies by suicide or self-destruction while sane.

Burt vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216;
Northwestern Mutual Life Ins. Co. vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419;
Ritter vs. *Mutual Life Ins. Co.*, 70 Fed. 954, (957);
Box vs. *Lanier*, 112 Tenn. 393, (409), 79 S. W. 1042;
Supreme Lodge, K. of P. vs. *Kutscher* 72 Ill. App. 462, (474).

10. But while the preceding paragraph states a reason for denying recovery to the executors, administrators, or assigns of assured in such circumstances, the cases that deny recovery on that ground alone fail to recognize the true legal reason for such denial, which is that as against such risk no contract exists. Consequently for death so caused no one can recover.

11. The incontestable clause does not preclude the defense of suicide or self-destruction by the assured, while sane, because as to such risk there is no insurance contract.

Supreme Council, Royal Arcanum vs. *Wishart*, 192 Fed. 453;
North American Union vs. *Trenner*, 138 Ill. App. 586;
Bromley's Adm'r vs. *Washington Life Ins. Co.*, 122 Ky. 402;
Scarborough vs. *American National Ins. Co.*, 171 N. C. 353, 88 S. E. 482;
Hall vs. *Mutual Reserve Fund Life Ass'n*, 19 Pa. Super. Ct. 31;
Starck vs. *Union Central Life Ins. Co.*, 134 Pa. St. 45;
Childress vs. *Fraternal Union*, 113 Tenn. 252, 82 S. W. 832;
Security Life Ins. Co. vs. *Dillard*, 117 Va. 401, 84 S. E. 656;
American National Ins. Co. vs. *Munson*, (Texas) 202 S. W. 987;

ARGUMENT

I.

A policy of life insurance does not insure against the risk of death by suicide or self-destruction of the assured, while sane.

This proposition seems to be settled in the Federal Courts. The precise question appears to have been presented first in a Federal court in *Ritter* vs. *Mutual Life Ins. Co.*, 69 Fed. 505, where the court instructed the jury in part (p. 507):

> "It seems to me, however, that every contract of life insurance contains an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural, ordinary course of events. * * * It cannot be doubted that if one having a policy on his buildings, insuring against fire, should intentionally burn them, his act would be a defense to the policy; nor that one taking a policy on the life of his debtor, whom he subsequently murders, cannot recover the insurance. In principle, I am unable to distinguish these cases from that where the insured commits suicide. * * *
>
> "His premiums are calculated, and his prospect of gain based, on the insured's chances of life under ordinary circumstances; and if the latter may render the insurance payable immediately by committing suicide, the former is completely at his mercy. If, however,

> an insurer should enter into such a contract, the law would declare it void, because of its violation of public policy. It would seem, in effect, to be a contract to pay money for the commission of suicide."

In this case the application, not attached to the policy, contained a warranty against suicide but was excluded because of the Pennsylvania statute. The plaintiff in error claimed the exclusion to be error, and this Court said in *Ritter* vs. *Mutual Life Ins. Co.*, 169 U. S. 139, 42 L. Ed. 693, (p. 144):

> "If error was committed in this particular, it was one for the benefit of the plaintiff in the action; for, if the application had been admitted in evidence as part of the contract of insurance, the agreement and warranty of the assured not to die by his own act, whether sane or insane, within two years from the date of the policy, would have precluded any judgment against the insurance company. Travelers *Ins. Co.* vs. *McConkey*, 127 U. S. 661, (666), 32 L. Ed. 308, (310). Upon this writ of error, therefore, we must assume that the contract of insurance contained no such agreement or warranty by the assured; nor any express condition avoiding the policy in case of suicide."

This Court further said (p. 151):

> "It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not in express words declare that it shall be void in the event of self-destruction when

the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise? * * * (p. 152)

"If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life."

And further (p. 154):

"When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. * * *

"There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind —the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced

without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment.

"If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provide for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

"Is the case any different in principle if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind?"

And in conclusion, (p. 160):

"For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, *was not a risk intended to be covered, or which could legally have been covered by the policies in suit.*" (The italics are ours.)

In *Burt* vs. *Union Central Life Ins. Co.*, 187, U. S. 362, 47 L. Ed. 216, the assured was convicted of wife murder and executed. The policy of life insurance sued on contained no

provision as to the effect of the assured's execution for crime.

In the opinion, this Court said (p. 366):

> "That case [*Amicable Society* vs. *Boland*, 4 Bligh. N. S. 194, (211)] was cited with approval in *Ritter* vs. *Mutual Life Ins. Co.*, 169 U. S. 139, 42 L. Ed. 683, in which we held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he, in sound mind, intentionally took his own life; and this, irrespective of the question whether there was a stipulation in the policy to that effect, or not."

In *Northwestern Mutual Life Ins. Co.* vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419, the question was: Does a life insurance policy insure against death by a legal execution for crime? Held, that such risk was not within the policy. Among other things this Court, referring to the *Burt* case, *supra*, said (p. 245):

> "In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: 'Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?' and answering, after discussion, we said: 'It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy

> forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.' "

Referring to the *Ritter* case, *supra*, the court said (p. 246):

> "There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. * * *
>
> "These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications."

In *Hopkins* vs. *Northwestern Life Assurance Co.*, 94 Fed. 729, the effect of suicide on dedendant's liability was involved. A benefit certificate issued to Mr. Hopkins contained no express condition against suicide. The defendant, having changed its name, subsequently issued a new life insurance policy to Mr. Hopkins without the consent of his wife, who was named beneficiary in the certificate. This policy contained a clause exempting the defendant from liability if assured, sane or insane, committed suicide within two years. Mr. Hopkins so died and suit was brought by the wife, claiming the right to recover under

the original certificate. The trial court disposed of the case on the assumption that the plaintiff's claim in this regard was well founded and that she could recover, if at all, under the original certificate. The court said (p.730):

> "Since the decision in *Ritter* vs. *Mutual Life Ins. Co.*, 169 U. S. 139, we do not think the question is open for discussion in the Federal Courts. * * * Without quoting from the opinion, it is enough to say, briefly, that the decision is put upon the ground that, although the policy contained no condition against suicide, nevertheless such a condition is an implied term of the contract; and, therefore, if the insured does commit suicide, there can be no recovery. It is true that in the Ritter case the policy was made payable to the assured himself or to his executors or administrators, while in the case before us the policy was made payable to the wife of the assured; but, in our opinion, *this difference is not important.* * * * (p. 731) It is a term of the policy, express or implied, that the assured will not die by his own wilful and deliberate act; and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured. Suicide does not 'avoid' the policy; against this event, the policy does not exist." (The italics are ours.)

In *Mutual Life Ins. Co.* vs. *Kelly*, 114 Fed. 268, the Circuit Court of Appeals for the Eighth Circuit considered the suicide clause of a policy and especially the rights of the designated beneficiary thereunder in event of suicide. The court said (p. 275):

> "Moreover, it seems to us that if there be an implied agreement on the part of every insured not to intentionally kill himself for the purpose of enforcing the liability under a policy,—and such, in our opinion, is the rule laid down in *Ritter* vs. *Insurance Company, supra,* —such agreement inheres in and forms a part of the contract, and is as much a condition to liability as if it were written out into an express agreement; and, that being so, for the reasons already pointed out, a third party, claiming under such a policy of insurance made for her benefit, ratifies and adopts the implied as well as the express conditions and limitations of the contract."

And further, the court said (p. 279):

> "While we have endeavored to answer the argument of counsel, based upon the technical doctrines of condition and warranty, we prefer to place our determination of this case upon the broad proposition that the contracts of insurance, when duly and legally construed, show that death of the insured by suicide, sane or insane, was a risk not undertaken by the insurer at all. * * * The company earned the premiums paid by Kelly for the risk which it agreed to assume, and which it did assume and carry until Kelly's death. This risk embraced death from practically all other causes but suicide."

In *Mutual Life Ins. Co.* vs. *Terry,* 82 U. S. 580, 21 L. Ed. 236, the policy contained a condition:

> "If the said person whose life is hereby insured * * * shall die by his own hand * * * this policy shall be null and void."

Assured died from self-administered poison. The court said (p. 590):

> "We hold the ruling on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

In *Travelers Ins. Co.* vs. *McConkey*, 127 U. S. 661, 32 L. Ed. 308, the policy contained a provision that

> "No claim shall be made under this policy when the death or injury may have been caused * * * by suicide (felonious or otherwise, sane or insane)."

This Court held (p. 668):

> "that, no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death."

and Justice Harlan further said (p. 666):

> "If he committed suicide, then the law was for the company, because the policy, by its terms, did not extend to or cover self-destruction, whether the insured was at the time sane or insane."

In the two cases last cited it is to be noted that this Court reached substantially the same conclusion as to the risks covered by the contract as it later reached in the cases where no provision as to suicide was included in the contract.

In *Weber* vs. *Supreme Tent Knights of Maccabees*, 172 N. Y. 490, 65 N. E. 258, the plaintiff died by suicide while insane. The company attempted to defend under a by-law, adopted subsequent to his becoming a member, which exonerated it from liability in such event. While judgment was affirmed for the plaintiff, in the discussion the court said (p. 493):

> "The query, therefore, is whether one who has become a member of this order and entered into a contract with it, may be deprived of rights under it by a subsequent amendment of the by-laws providing that unintentional self-destruction shall avoid the policy. It needs no amendment to the by-laws to accomplish that result where a person of sound mind deliberately takes his own life, for in such case, as the Supreme Court of the United States held in *Ritter* vs. *Insurance Company*, 169 U. S. 139, it is an implied condition of the policy that the insured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than deliberate, wilful self-destruction."

In *Shipman* vs. *Protected Home Circle*, 174 N. Y. 398, a mutual benefit certificate was the basis of the action. Defense was in part founded on an amendment to the by-laws of the association, restricting liability in event of death by suicide, sane or insane. The court said (p. 405):

> "To the extent that the amended by-law provides for a forfeiture of contract rights in the event of suicide by the insured while he was sane, it is valid, first, because it invades no vested right of the insured, and, second, because it is a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. If we assume, therefore, that the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the amended by-law is valid because there can be no such thing as a vested right to commit suicide and for the further reason that it is nothing more than the written expression of a provision which the law had read into the contract at its inception."

In *Mooney* vs. *Ancient Order of United Workmen*, 114 Ky. 950, 72 S. W. 288, an action based on a benefit certificate containing no reference to suicide, the court quoted with approval (p. 959) from 19 American and English Encyclopedia of Law, p. 73:

> "In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life. * * * In the second place, the enforcement of the con-

tract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy, in that it tempted or encouraged the insured to commit suicide, and it is obvious that the court will not imply a condition which if expressed in the contract would render it void."

Hunziker vs. *Supreme Lodge K. of P.*, 117 Ky. 418, 78 S. W. 201, approves (p. 428) the *Mooney* case, *supra*, and also the above quotation.

In *Supreme Commandery, K. of G. R.* vs. *Ainsworth*, 71 Ala. 436, considering suicide, the court said (p. 447):

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money. * * * The fair and just interpretation of a contract of life insurance made with the assured is that the risk is of death proceeding from other causes than the voluntary act of the assured producing or intended to produce it. * * * The extinction of life by disease, or by accident, not suicide voluntary and intentional by the assured while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

In *Plunkett* vs. *Supreme Conclave, Heptasophs*, 105 Va. 643, 55 S. E. 9, the action is on a benefit certificate claimed to have been amended by a subsequent by-law, changing the liability in case of suicide. The court said (p. 646):

> "Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the assured, while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception."

Held, that as assured's death was by suicide while sane, there could be no recovery.

In *Schmidt* vs. *National Life Assn.*, 112 Ia. 41, 51 L. R. A. 141, action was brought by the administrator of the assured under a beneficiary certificate which was payable to the wife of the assured. She murdered the assured. Subsequently she assigned the policy and her assignee and one of her children, as heir, intervened in the suit. The court held there could be no recovery by the assignee or heirs of the wife, and said (p. 45):

> "The public has an interest in such matters over and beyond the individuals or societies involved, and courts are not bound to enforce or hold valid any contract which offends public morals, violates the law or contravenes public policy. Had the certificate contained a condition to the effect that benefits would be paid in the event the beneficiary took the life

> of the insured, it would clearly be opposed to public policy, and would not be enforced. If recovery were permitted by the beneficiary or her assignee in this action, it would be giving the same effect to the certificate as if such a clause was included in the contract. Neither of the interveners, Bendt or Vollmer, is entitled to recover."

In *McDonald* vs. *Mutual Life Ins. Co.*, 178 Ia. 863, 160 N. W. 289, the court held that if the parents of assured were her sole heirs and beneficiaries under a policy and had aided in procuring the performance of a criminal operation resulting in her death, the insurer was not liable.

We submit that the logical result of this holding is that there is no liability on the part of the insurer where the assured takes his own life, while sane, because that risk is not covered by the contract, and a contract to cover it would be contrary to public policy. To allow such a recovery would be a fraud on the insurer. These cases are based on the same principle laid down by Mr. Justice Field in the *Armstrong* case, *supra*, concerning which the Circuit Court in *Ritter* vs. *Mutual Life Ins. Co.*, 70 Fed. 954, a suicide case, said (p. 958):

> "There is, it would seem to us, in principle, no distinction between the instances thus put by Justice Field and the case now before us."

It is true that in the *Schmidt* case the court permitted a recovery by the administrator

of the assured, but that does not alter the conclusion to be drawn from these cases.

In *Rudolph* vs. *United States*, 36 App. cases, D. C., 379, an action brought to compel the allowance of a pension to the wife and daughter of a policeman of the District of Columbia, who died by suicide, the police pension system of the District was the subject matter of discussion. In the argument, the court said (p. 389):

> "There is no difference in law between a contract of insurance which expressly provides against recovery in case of suicide, and one where such a provision is implied. The prohibition is in the contract in both instances. The one forbids recovery as effectually as the other, and in neither case can the contract be enforced. If such a provision is implied in an insurance contract, there is no logical reason against a similar construction being implied to the statute in question. Both stand upon the broad ground of public policy."

Suicide while sane is plainly not a risk insured against by a policy silent on that subject.

II.

Public policy does not permit insurance against death from acts done in violation of law, or by legal execution for crime, or as the result of illegal acts.

The holding that suicide is outside the risks that may be properly insured against is in line with the cases holding that risks from violating the law are not insurable.

In *Burt* vs. *Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. Ed. 216, the assured was convicted of wife murder and executed. The plaintiffs were the assigns and heirs of the assured. The court said (p. 365):

> "The plaintiffs, therefore, in each of the cases claimed directly under the insured, and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime."

And further (p. 365):

> "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. *There is an implied obligation on his part to do nothing to wrongfully aaccelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.*" * * * (The italics are ours.)
>
> "There is a wagering feature in such a stipulation which forbids its being incorporated into a policy of insurance, and, if it cannot be formally incorporated into the contract, its omission therefrom does not, by implication, give it life and vitality. (p. 369) * * *
>
> "The plaintiffs made no contract, but they are seeking to enforce one containing so far as they are concerned, all the elements, which, as indicated in the quotations just made, forbid its enforcement on the ground of public policy." (p. 370)

The doctrine of the *Burt* case was reaffirmed in *Northwestern Mutual Life Ins. Co.* vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419.

In this case (*McCue*) the question was: Does a life insurance policy insure against death by legal execution for crime? The court held that such risk was not one assumed by the policy. In the opinion this Court reaffirms the doctrines announced in the *Burt* case, *supra*, and in the *Ritter* case, *supra*. It approves *Plunkett* vs. *Supreme Conclave, Heptasophs*, 05 Va. 643, and criticises and declines to follow the doctrines of *Patterson* vs. *Natural Premium Life Ins. Co.*, 100 Wis. 118.

Public policy prohibits that the death of a woman who submits to a criminal operation be the basis of a recovery under an insurance policy.

Hatch vs. *Mutual Life Ins. Co.*, 120 Mass. 550;

In this case the court said (p. 552):

> "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth."

Approved in *Burt* vs. *Union Central Life Ins. Co.*, *supra*, and *Wells* vs. *New Eng. Mutual Life Ins. Co.*, 191 Pa. St. 207, 43 Atl. 126.

In *Mutual Life Ins. Co.* vs. *Armstrong*, 117 U. S. 591, 29 L. Ed. 997, one Hunter procured an endowment policy on John M. Armstrong, payable to the assured or his assigns, on a date stated, or, if he should die before that time, to his legal representatives. Hunter subsequently killed Armstrong and this action was brought by the administratrix of Armstrong. It was held that there could be no recovery. This court said, (p. 600):

> "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

If one is killed while in the act of violating the law, as in breaking into a house or in a quarrel, there can be no recovery under a policy which excepts, as a ground of liability, death while violating or attempting to violate the criminal law, but to exempt the insurer death must result from the violation of law and not simply be contemporaneous therewith.

Supreme Lodge K. of P. vs. *Beck*, 181 U. S. 49, 45 L. Ed. 741;

Travelers Ins. Co. vs. *Seaver*, 86 U. S. 531, 22 L. Ed. 155;

Accident Ins. Co. of No. America vs. *Bennett*, 90 Tenn. 256, 16 S. W. 723.

In the Seaver case, *supra*, this court said (p. 541):

> "The company in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violation."

In *Bloom* vs. *Franklin Life Ins. Co.*, 97 Ind. 478, the court said (p. 484):

> "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk."

In *Prudential Life Ins. Co.* vs. *Haley*, 91 Ill. App. 363, it is held that the risk arising from an unlawful undertaking is one which public policy will not permit to be covered by insurance. Citing with approval, *Hatch* vs. *Mutual Life Ins. Co., supra.*

The foregoing rules are in line with those covering fire and marine insurance risks, where it is well settled that a person who insures property against fire or marine risks cannot recover for his own wilful destruction of the property.

Somewhat akin to these cases and resting on the same general principles of public policy are those statutes relating to Employers' Liability and Workmen's Compensation, which declare that employees shall not recover for injuries resulting from risks assumed or for their own negligence, and also those providing that a workman may not recover for his self-inflicted injury or for his own "serious and wilful misconduct."

III.

Suicide is a crime and malum in se.

By the early common law of England suicide was ranked among infamous crimes, and held to be a species of felony. It was punished by forfeiture to the King of the goods and chattels of the *felo de se* and by an ignominious burial on the highway with a stake driven through his body.

4 *Blackstone Commentaries*, 189;
May vs. *Pennell*, 101 Me. 516.

It must still be deemed criminal as *malum in se*, even if not punishable.

Commonwealth vs. *Mink*, 123 Mass. 422.

At common law it was considered a crime against the laws of God and man, and one who persuaded another to kill himself and was present when he did so was guilty of murder as a principal.

Commonwealth vs. *Mink*, 123 Mass. 422;
Commonwealth vs. *Bowen*, 13 Mass. 356;
Rex vs. *Tyson*, Russ & R. C. C. 523.

It is a crime of awful turpitude.

Commonwealth vs. *Bowen*, 13 Mass. 356.

In Illinois, where suicide seems not to be a felony, it is held that one accessory to suicide is guilty of murder as a principal.

Burnett vs. *People*, 204 Ill. 208.

It is contrary to the general conduct of mankind. It shows gross moral turpitude in a sane person.

Mallory vs. *Travelers Ins. Co.*,47 N. Y. 54,(56).

This court seems always to have regarded it as criminal.

See cases cited *supra.*

IV.

The life insurance contract determines and limits the rights of all parties thereto, and recovery for death of assured must be in accordance with the provisions of the contract, irrespective of the party plaintiff.

In *Mutual Life Ins. Co.* vs. *Terry,* 82 U. S. 580, 21 L. Ed. 236, the contract was made between Mrs Terry, wife of assured, and the company, and was payable to her. The question arose whether there was any difference in the interpretation and effect of a contract so made and payable and one made by the assured and the company. The court said (p. 591):

> "In the present instance, the contract of insurance was made between Mrs. Terry and the company; the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. *We see no difference in*

the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties." (The italics are ours.)

In *Hopkins* vs. *Northwestern Life Assurance Co.*, 94 Fed. 729, the court said (p. 730):

"It is true that in Ritter's case the policy was made payable to the assured himself or to his executors or administrators, while in the case before us the policy was made payable to the wife of the assured; but, in our opinion, this difference is not important. In either event, the terms, whether express or implied, of the contract, must control the right to recover; and, *if these terms exclude the risk by which death is caused, no person whatever can have an enforceable right based upon such a death.*

"We think it may be misleading to speak of this contract as being 'avoided' in case of suicide. Such language is often used in policies, and finds its way thence into the decisions of the courts; but it seems to be more accurate to say that the contract does not insure at all against death by suicide. It is a term of the policy, express or implied, that the assured will not die by his own wilful and deliberate act; and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured. *Suicide does not 'avoid' the policy; against this event, the policy does not exist.* (The italics are ours.)

Further (p. 731):

"It seems to follow that the quality and extent of the beneficiary's interest in the contract is of no importance. The question is, does the policy forbid suicide? If so, death

by that act is a risk that is not insured against, and can therefore furnish no ground for recovery. The fact that the beneficiary is some other person than the insured himself cannot enlarge the scope of the contract. * * *

"The beneficiary does not receive a gift of a policy against suicide, for the contract does not cover death by such an act, and therefore the insured does not take away what he did not and could not give. But whatever weight should be allowed to this case [*Morris* vs. *Assurance Company*, 183 Pa. St. 563] in the courts of the state, we are bound to follow the decision in *Ritter* vs. *Insurance Company* and *this is founded upon the principle that recovery cannot be had because the company has not insured against this particular risk.*" (The italics are ours.)

Affirmed by Circuit Court of Appeals, *S. C.*, 99 Fed. 199.

In *Mutual Life Ins. Co.* vs. *Kelly*, 114 Fed. 268, the Circuit Court of Appeals for the Eighth Circuit said (p. 274):

"It cannot be disputed that plaintiff, who was Kelly's wife and beneficiary in the policy in question, had a certain vested interest in the policy immediately upon its issue; such an interest, in fact, that neither Kelly, nor the insurer, nor both, could by appointment or agreement take from her without her consent. *Her rights were created by the contract, and she, as one of the parties thereto, must, on familiar principles, consent to any deprivation, modification, or change of such rights before the same can be accomplished.* But this well recognized principle falls far short of sustaining plaintiff's contention in this case.

> The question still remains, with what rights was she vested? *This obviously depends upon the terms and conditions of the contract creating them.* The husband assumed to act as her agent in the negotiation for a contract intended to be beneficial to her. He gave the consideration therefor, consisting partly of certain executory promises. He secured the promise from the insurance company to pay money to the wife, in case of his death, by promising that such death should not, for two years at least, be the result of his own act, sane or insane. All this was so done as to disclose a clear intention on the part of both that no risk against such death should be assumed by the company.
>
> "The wife, by asserting her claim on the policy, ratifies and affiirms the contract as made by her agent, and that, too, subject to all its terms and conditions. She cannot avail herself of the promise to pay her the amount of the policy, and simultaneously repudiate the promise made by her husband, which was given to the insurer as a consideration for its undertaking. *Neither can she enlarge the obligations of the insurer beyond the scope of that undertaken by it.*" (The italics are ours.)

Further, the court said (p. 280):

> "The company earned the premiums paid by Kelly for the risk which it agreed to assume, and which it did assume and carry until Kelly's death. This risk embraced death from practically all other causes but suicide."

In *Northwestern Mutual Life Ins. Co.* vs. *McCue*, 223 U. S. 234, 56 L. Ed. 419, the court said (p. 249):

> "But what constitutes his title or right? Necessarily his policy. What entitles him to a realization of the benefits of his membership? Necessarily, again, his policy, if the manner of his death be not a violation of it. * * * The question before us, and the only question is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the Federal Courts of Virginia, in which state the contract was made. And it is consonant with the ruling in the State courts."

And further (p. 252):

> "It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, —the policy is the measure of the rights of everybody under it, and as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children".

In *Pitt* vs. *Berkshire Life Ins. Co.*, 100 Mass. 500, an action by the beneficiary based on an ordinary life insurance policy, the court said (p. 503):

> "The rights of the plaintiff must be determined by the terms of the contract to which the assured assented, when such terms did not contravene the principles of law or public policy."

In *Supreme Conclave, Heptasophs* vs. *Rehan*, 119 Md. 92, an action by the wife and designated beneficiary under a benefit certificate,

the right of a beneficial order to so change its by-laws as to reduce the benefits thereunder in case of suicide of a member, while sane or insane, was involved. The court said (p. 103):

> "We therefore hold, upon what we regard as the safer, sounder, and more reasonable rule upon this question, that the after-enacted by-law before us is not binding upon the plaintiff if her husband took his own life while insane, but *that it is binding upon her if he committed suicide while sane.*" (The italics are ours.)

In *Davis* vs. *Royal Arcanum*, 195 Mass. 402, assured died by suicide. The action is by the widow, based upon a benefit certificate naming her as beneficiary. Held, that there could be no recovery on the ground of public policy. The court said (p. 409):

> "It is accordingly held that the beneficiary, under such a certificate, has no greater rights than the executor or administrator of the insured would have if there were no beneficiary. See *Hartman* vs. *Keystone Ins. Co.*, 21 Penn. St. 466. The cases which rest on a contrary doctrine do not seem to us to be founded on sound principles. They depend on considerations which are not applicable to a contract of this kind. * * *
>
> "The writers of the opinions in these cases seem to ignore the fact that, by the true construction of the contract, as between the association and the insured, there is an implied exception of death by suicide from the statement that death creates a liability, and that as the contract as to the person to be paid

is all the while in the control of the insured up to the time of his death, it should not be treated as larger and more beneficial in the hands of the beneficiary than it is in the hands of the insured. * * * It is questionable whether some of the cases have not gone too far in holding ordinary life insurance companies liable to beneficiaries for death by suicide when the policy was silent on that subject. It is true, as is said in some of these cases, that the insured cannot deprive a beneficiary of his rights by his subsequent misconduct. But it is equally true that if the original contract impliedly excepts from its provisions cases of death by suicide, and if that is its true construction when considered in reference to the beneficiary as well as in reference to the insured, there is no more liability to the beneficiary for such a death than there would be to the executor or administrator of the insured. The judge rightly refused the plaintiff's different requests for rulings that she might recover under her special rights as a beneficiary."

V.

A benefit to one's estate is, in legal contemplation, the same as a benefit to one's self.

Under the Roman law the concept of the family enters into the concept of inheritance. The family was an institution in some respects like the modern corporation, and had an interest in the property, title to which was in the head of the family. The property of the paterfamilias descended not to an estate as with us, but to the heirs.

"The fundamental idea which lies at the root both of proprietary rights and of proprietary liabilities or obligations, is the idea of immortality.

"An owner may die, but his ownership survives him. A debtor may pass away, but his debt remains. * * *

"In Roman jurisprudence hereditary succession takes the form of universal succession. * * * Each heir takes, on principle, the whole estate. * * * Hereditary succession must necessarily be a succession to an estate, i. e., the whole mass of rights and obligations left by a person on his death.* * *

"In his capacity of heir he represents the deceased, whose rights and liabilities are therefore, in an equal measure, his. The heir, as such is absolutely one with the deceased. In contemplation of private law, therefore, the deceased continues to live in the person of the heir. The essence of universal succession is that it is not, strictly speaking, a *succession* but a *continuation*. * * * It is in this sense that universal succession is said to be a succession to a personality."

Sohm's Institutes of Roman Law, Ledlie 3rd Ed. pp. 501-5.

Our concept of inheritance and descent of property is in most respects the same as the universal succession under the Roman law, except that as to personal property executors or administrators perform under our law part of the functions of the heir under the Roman law.

"They [executors and administrators] are clothed with authority to act in all matters connected with the disposition of the dece-

> dent's estate, precisely as he himself would rationally have done. * * * It is the province of the courts having jurisdiction over executors and administrators to supply the individual will lacking in property, to fill the vacuum created by the death of the owner with the content of the universal will; that is, to secure the disposition of property under administration as the owner, acting rationally, would have disposed of it if living."

1 *Woerner, American Law of Administration*, Secs. 10, 11.

While with us the heir takes through the estate and not direct from the ancestors, for all practical purposes the estate under American law is as much a continuation of the aggregate of the rights and obligations of the deceased as was the heir the successor of the ancestor under the Roman universal succession. In the eye of the law the person and his estate, so far as property rights are concerned, are one and the same.

VI.

The federal rule which excludes suicide from the risks covered by a life insurance contract is founded on sound legal principles, a correct view of public policy, and a proper analysis of the contract.

There are some cases where the doctrine of the Federal Courts is not recognized. In those cases, the rule appears to be that: Suicide will not defeat a recovery on a contract of life insurance or a mutu... benefit certificate,

not procured by the insured with the intention of committing suicide, unless the contract so states in express terms. If, however, the interest in the policy is vested in third parties as beneficiaries and the contract was entered into in good faith, the subsequent guilty act of self-destruction by the insured will not vitiate it to the prejudice of the beneficiaries in the absence of a suicide clause. But under these intrepretations of the contract the courts deny recovery to the executors and administrators in case of assured's suicide while sane.

These cases seem to be based on an incorrect analysis of the contract, a somewhat perverted view of public policy, and a confusing application of certain general principles, such as, the identity of the assured and his estate, that one may not benefit from his own wrongful act, the doctrine of vested rights, the obligation of a contract, and that a vested right of an innocent person cannot be destroyed by the wrongful act of a third person.

As a rule, a contract of life insurance is made by the assured and the insurer. Rarely does the beneficiary have anything to do with procuring the policy. The rights of the beneficiary in such cases are derived from the gift or act of the assured and all the rights of the beneficiary are derived through the assured. Since the contract is made by the insurer and the assured and the contract determines the rights of the parties, the beneficiary takes a

vested interest only in the contract as made. The contract in which the interest is vested is the same whether the beneficiary be the executor or administrator of the assured or some other person.

The contract defines the rights under it. The personality of the beneficiary does not change the terms of the contract or the risks assumed. To hold that the risks insured against by the same contract are different according as one or another becomes the beneficiary of the contract is manifestly unsound. After an insurance contract is issued the assured may name a different beneficiary than his executors or administrators. He may assign the contract, either with or without consideration, as collateral security or absolutely. The original contract fixes the measure of the liability and the risks assumed by the insurer.

Under the rule in those courts that differ from the Federal courts, the insurer's rights under the same contract may vary from day to day and the risks which he had assumed be enlarged or decreased according as the assured changes the payee or person who may become beneficially interested in the contract. Such a result is unmutual. It destroys the contract; it leaves the insurer uncertain what his liabilities are.

Under the Federal rule with relation to suicide the risks assumed remain constant under all circumstances under a given contract. Consequently, the Federal rule is the

only sound rule, the only rule that is consistent and in all circumstances fully protects the rights of the parties and preserves the integrity and scope of the contract as originally made.

Some courts, recognizing the absolute identity of the assured and his estate, which makes any benefit to the estate the same as an equal benefit to the assured himself, hold that the maxim that no one can benefit from his own wrongful act and the implied agreement that assured shall not by his own act accelerate the time of payment under the contract constitute a full and complete defense to an action on an insurance contract in event of suicide of assured while sane, when his executors or administrators are plaintiffs, but not when another is beneficiary. This is a sufficient reason for denying recovery to the executors or administrators, but what greater reason is there to read such defense into a contract payable to one's estate than into the same contract made by the same parties but payable to another?

Those courts seem to have overlooked or ignored the rule so properly and wisely applied to this class of cases by the Federal courts, that public policy prohibits a contract which tends to encourage or invite the commission of crime or other wrongful act irrespective of who may benefit thereby.

The Federal rule excluding suicide from the risk assumed is a practical and simple work-

ing rule that applies in all cases. The other rule is simply a further invitation to fraud and a means of enabling a sane person to defraud the insurance company. Take the case of a sane person insured under a policy payable to his estate. Under all the cases suicide defeats liability, but under the rule in those courts which differ from the Federal Courts, if such assured changes the beneficiary to his wife or other designated person not his estate and then suicides, there may be a recovery. But the contract has not been changed in any of its terms; the payee only is different. In the case just stated the contract under which the executors or administrators of the assured would be denied a recovery is the identical one under which the substituted payee would by those courts be allowed to recover. Such opposite results on the same facts must result from an unsound rule.

It is a fiction that the beneficiary is a party to the contract. He is not so in fact. At common law, and in those states where the common law prevails unaltered by statute, the beneficiary cannot sue on the insurance contract in his own name but the suit must be brought in the name of the executors or administrators of the assured who made the contract. By statute in many states the right of action is given to the beneficiary, who, but for the statute, could not sue in his own name. We submit that the rights of the beneficiary are not independent of the assured but are

derived from and through assured, and so another beneficiary should not stand better than assured's estate in case of his suicide. Those cases that make a distinction in the rights and liabilities under the same contract dependent upon the payee are fundamentally unsound in principle.

VII.

The incontestable clause does not preclude the defense of suicide or self-destruction by the assured while sane.

In *Scarborough* vs. *American National Ins. Co.*, 171 N.C. 353, it was held that the execution of the assured for crime, in the absence of any reference thereto in the policy, was not within the terms of the policy; that defendant was not liable therefor. The policy contained an incontestable clause concerning which the court said (p. 355):

> "The incontestable clause in this policy does not prevent the defendant from setting up the defense interposed in this action.
>
> "By the use of the term 'incontestable,' the parties must necessarily mean that the provisions of the policy will not be contested, and not that the insurance company agrees to waive the right to defend itself against a risk which it never contracted to assume. In *Collins* vs. *Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 345, the court in a case precisely like the one at bar, in construing the incontestable clause, used the following language: 'By its terms it is not the claim pre-

> sented by the insured, irrespective of the cause of death, which is made incontestable; it is merely the validity of the policy as an obligation binding upon the company.'"

This was cited with approval in *American National Ins. Co.* vs. *Munson*, infra.

In *Security Life Ins. Co.* vs. *Dillard*, 117 Va. 401, the action was based on a policy of insurance which had no reference to the question of suicide. Held, that suicide was a complete defense to an action on such policy whether it be for the benefit of the assured's family or his estate. The court said (p. 407):

> "Our decision of this case rests entirely upon the considerations of public policy above adverted to and fully discussed in the foregoing authorities. These considerations have to do, not with the interest of the parties litigant, but with the public weal, and they overreach, in a case shown by the record to call for their exercise, all mere formal rules of procedure. They can no more be waived, either intentionally or unintentionally, by stipulations or defects in the pleadings than by provisions or omissions in the contract in litigation. As was said by Mr. Justice Field in *Oscanyan* vs. *W. R. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, referring to a case in which a recovery was forbidden by morality and public policy, 'the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice.'"

In *Supreme Council Royal Arcanum* vs. *Wishart*, 192 Fed. 453, the court said (p. 455):

> "We therefore cannot agree to the proposition urged on the part of the appellee * * * that 'where a life insurance company or a beneficial society fixed a period in its policy, certificate or by-laws, within which, if the insured commits suicide, the policy or certificate should be avoided, death of the insured by suicide after the expiration of such period does not constitute a defense to an action on the policy.
>
> "We must assume from reason as well as authority that, prior to the adoption of the by-laws in question, it was not 'within the contemplation of either party to the contract, that the company shall be liable upon its promise to pay, where the insured in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise.' 'Suicide' by one of sound mind, 'does not avoid' the policy; against this event the policy does not exist. * * * (p. 456.) By this provision, if the insured takes his own life within the period named, there is no question of sanity or insanity to be determined, because the contract in effect stipulates that, under such circumstances, there shall be no liability, whatever the condition of the insured might have been as to sanity or insanity. It would seem necessarily to follow that cases of suicide, after the expiration of this prescribed period, must be governed by the general law of the contract to which we have above alluded, and the liability of the insurer will depend upon the sanity or insanity of the insured."

In *American National Ins. Co.* vs. *Munson*, (Texas), 202 S. W. 987, it was held, following the *Scarborough* case, *supra*, that an incontestable clause does not prevent the defense; that death by legal execution is not one of the risks assumed, and this notwithstanding the Texas statute which required an incontestable clause in the policy.

In conclusion, discussing the effect of the Texas statute in connection with the incontestable clause, and answering the plaintiff's argument, the court said (p. 989):

> "We cannot agree with this contention made by able counsel for defendant in error, for we cannot believe that the Legislature of this state intended, by the statute above mentioned, to declare that it should be in keeping with the sound public policy of this state to permit an insurance company to make a valid contract of life insurance covering the risk of death inflicted by the courts of justice in this state."

In *Bromley's Admr.* vs. *Washington Life Ins. Co.*, 122 Ky. 402, assured took out a policy for the benefit of the assignee who paid the premiums, thus having a wagering interest which the court held was against public policy and void. It was claimed that under the incontestable clause defense could not be made. The court said (p. 406):

> "But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy the court will not lend its aid to its enforce-

ment. The defense need not be pleaded. If at any time it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief. The parties to an illegal contract cannot by stipulating that it shall be incontestable tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases and the aid of the court might be secured in aid of its infraction. In *Hall* vs. *Coppell*, 7 Wall. 559, 19 L. Ed. 244, the U. S. Supreme Court said: 'the defense is allowed, not for the sake of the defendant but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, Ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

In *Hall* vs. *Mutual Reserve Fund Life Assn.*, 19 Pa. Super. Ct. 31, the policy excepted the risk of death by suicide and provided only for return of premiums paid in such case.

It was held that the defense of suicide was not prevented by a clause making the policy incontestable after a given period. The court said (p. 35):

> "That clause operates only as a waiver, after three years, of any defense to either claim, except on the grounds therein specified. It does not convert an exception of any risk into an assumption of it, or bar defense to a claim on a risk not assumed. It gives no warrant for reading into the contract a liability expressly excepted from it."

In *North American Union* vs. *Trenner* 138 Ill. App. 586, the policy provided that if a member should die by his own hand, his beneficiary should receive only one-half of the face of the policy, and there was also a clause making the contract incontestable after two years. It was held that the suicide clause was a part of the contract to pay a limited sum in case of suicide. The court said (p. 593):

> "Insisting upon this clause and offering to comply with it, and pay one-half of the amount named in the contract, and tendering the same to appellee, is not contesting the validity of the contract. On the contrary, it is admitting its validity, and is doing all that appellant is required to do to perform and fulfil the contract on its part."

In *Childress* vs. *Fraternal Union*, 113 Tenn. 252, the policy provided that if the assured committed suicide, the indemnity paid should be one-third of the amount otherwise due and the incontestable clause provided for in-

contestability after two years, except as to agreements, representations and warranties in relation to age, occupation, and the use of alcoholic stimulants.

It was held that suicide was not within the exceptions and that, while the policy became incontestable after two years, except upon the grounds stated, it was in force according to its terms and that the terms were plain that the beneficiary in case of suicide should be entitled only to the limited amount specified, and that therefore only this sum could be collected where the assured committed suicide after the expiration of the incontestable clause.

See also *Starck* vs. *Union Central Life Ins. Co.*, 134 Pa. St. 45.

In the case at bar, the validity of the contract as to death from any causes except those that the law and the policy exclude from the risks assumed, is admitted. But plaintiff in error claims that death by suicide, while sane, was not a risk assumed, nor one that could have been lawfully assumed, and, therefore, that this suit is not in fact based on the contract but on a claim outside the contract. As to such claim and any defense thereto, the incontestable clause has no application.

The purpose and intent of the incontestable clause is to prevent the insurer denying liability on the contract or, after the lapse of a certain time, taking advantage of fraud or misrepresentation of the assured inducing

the contract. It is not the purpose or intent of the clause to enlarge the contract or to make it cover risks which it does not otherwise cover. To hold that the incontestable clause prevents the defense of suicide under a contract which does not insure against the risk of suicide is to wholly misconstrue the purpose and intent of that clause.

The incontestable clause is somewhat analogous to a short statute of limitations or repose. By it the company declares in effect that within the period named it will undertake any desired and needful investigations into the circumstances and good faith of the assured, and that, if within that period no action has been taken by it to rescind the contract, no contest will thereafter be made on account of anything which occurred prior thereto. It never was the intent or purpose of such a clause to enlarge or extend the risks assumed by the policy. It was designed to limit defenses, not to extend the contract.

Suicide, while sane, is a risk which the law says may not be insured against, and is not covered by a policy silent on the subject. To hold that suicide is not a defense under such a policy containing an incontestable clause is not only to give to that clause an effect in enlarging the scope of the contract never intended, but it enforces a liability on the insurer that it never undertook and one which it could not lawfully undertake by express terms. Such construction of the clause would

make the court enforce an unlawful contract and one against public policy. Such result is absurd.

Under the circumstances in this case, the incontestable clause has no effect and does not preclude the defense of suicide.

VIII.

The proposed answers to questions submitted.

The policy described in the questions submitted by the Circuit Court of Appeals clearly excepts the risk of death by suicide from the risks assumed by the insurer. Without such exception the policy would be void as against public policy as to that risk.

The case as presented concedes the suicide of the assured while sane. Consequently, the assured died from a risk not covered by the contract. The policy is payable to the executors, administrators and assigns of the assured, consequently, under any theory, there can be no recovery in this case.

We respectfully submit that death by suicide, while sane, is a risk that is not covered by a life insurance policy silent on the subject of suicide; that it is a risk which the law does not permit the insurer to assume, because contrary to public policy; that under such contract there can be no recovery by any one and surely not by the executors, administra-

tors or assigns of assured, because in such case death is from a risk not insured against; that the incontestable clause of such policy does not preclude defense of suicide while sane.

Therefore, we further submit that the proposed answers set forth on page 3 hereof are sound and proper answers under the law to the questions submitted by the Circuit Court of Appeals, and that this Court should answer said questions, in substance, as stated in said proposed answers.

GEORGE B. YOUNG
E. D. PERRY
GUY B. HORTON
Counsel for plaintiff in error

MONTPELIER, VT., February 20, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. [redacted]71

NATIONAL LIFE INSURANCE COMPANY (of Montpelier, Vermont), *Plaintiff in Error.*

vs.

A. M. MILLER, ADMR. OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR

S. F. PROUTY,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 306.

NATIONAL LIFE INSURANCE COMPANY (of Montpelier, Vermont), *Plaintiff in Error.*

vs.

A. M. MILLER, ADMR. OF THE ESTATE OF GEORGE P. JOHNSON, DECEASED, *Defendant in Error.*

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANT IN ERROR

There are four questions raised by the certified record,

1. Was the question of suicide properly raised by plaintiff in error under the forms and manner of procedure prescribed by the laws of Iowa?

2. Does the incontestable clause of the policy cover the risk of suicide in the absence of an express exception?

3. Is the assumption of the risk of suicide prohibited as against public policy?

4. Is the company estopped from claiming that the policy is void as against public policy after having collected and held the premium without returning, or offering to return, the premiums?

We will discuss these questions in the order named.

WAS THE QUESTION OF SUICIDE PROPERLY RAISED?

Counsel for plaintiff in error now claim that an express provision covering the risk of suicide is, or would be void as against public policy. And the first thing for determination is whether such a question could be properly raised for the first time in a motion for directed verdict, or whether it should have been raised by a proper pleading that such a provision was void or voidable. This raises a question of procedure.

This is a law action and was brought in the District Court of Polk County, Iowa, and transferred by plaintiff in error to the Federal Court and was tried in the Southern District, Central Division of Iowa. Under the Federal statutes the forms and modes of procedure are governed by the laws of Iowa.

Section 914 of the Federal Statutes, Vol. 4, page 563 provides:

> "The practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Court, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in courts of record of the State within such Circuit or District are held, any rule of court to the contrary notwithstanding."

This leads us to consider how and in what manner the question of voidability of this provision of the policy could have been raised under the laws of Iowa.

Section 3629 of the Code of Iowa provides:

> "Matters Specifically Pleaded:
> Any defense showing that a contract written or oral, or any instrument sued on, is void or voidable, * * * must be specifically pleaded."

Counsel for plaintiff in error are now claiming that notwithstanding the fact that the policy covered the risk of suicide after one year, that this provision of the policy is void as against public policy. If such was their claim or contention below they ought under the statutes of Iowa to have pleaded it. There may be some question in other jurisdictions as to the manner in which this question could be raised.

but there is no question under the statutes and decisions of Iowa. Counsel for defendant below did not raise this question by any pleading nor in any manner during the trial of the case. They denied that that the insured was dead or had died by suicide as claimed by plaintiff below. They never raised the question in any way until they offered the motion for a directed verdict at the close of the trial. They cannot raise such a question in this way under the forms of procedure prescribed in Iowa.

In the case of *Reich vs. Booch*, 68 Iowa, page 526, this question is decided. That was a case where the contract was made on Sunday, which, under the statutes of Iowa, on account of public policy, is declared void and not enforcible. The evidence tended to show that the contract in controversy was made on Sunday and consequently void. The court says:

> "There was evidence tending to prove that the contract under whch plaintiff performed the labor for which he seeks to recover, was entered into between parties on Sunday. Defendant asked the court to instruct the jury that if they found that the contract was entered into on Sunday their verdict should be for defendant. The court refused to give this instruction, and told the jury that they need not consider that claim, or the evidence which tended to prove that the contract was entered into on Sunday. Defendant assigned these rulings as error. We think they are correct. The defense which defendant sought to establish by the evidence was that the contract under which the services were rendered was illegal, and consequently void. Our statute (Code Sec. 2718) (now 3629) requires that defendant did not plead that defense in his answer. He denied the terms of the agreement were as alleged by plaintiff, but he made no averment as to the legality of the contract. Under the pleadings he was clearly not entitled to have the question as to its legality submitted to the jury."

Under the contention of counsel for plaintiff in error, in their argument when it appeared to the court that this was an illegal contract, it was the duty of the court to stop proceedings and dismiss plaintiff's cause of action because no rights could be based on such a contract. But the court held,

and rightfully, under the statute, that if defendant wished to raise that question, he must do it in the pleadings, so as to advise the other party of the issue to be tendered.

The question is also decided in *Shawyer vs. Chamberlain*, 113 Iowa, page 742. This was a case in which it appeared that part of the goods sold were intoxicating liquors, and under the statute and prior decisions of Iowa, such contract was absolutely null and void. It appeared in the evidence that such intoxicating liquors were a part of the stock of goods transferred, and the party sought to forfeit the contract on that ground, but had not plead it. The court says (page 744):

> "The record discloses that the stock included intoxicating liquors valued at $164.34. The defendant urges that because of this the contract was void, under Section 2423 of the Code. See *Lindt vs. Uihlein*, 109 Iowa, 591. But any defense showing that a contract written or oral, * * * is void or voidable, * * * must be specially pleaded. Section 3529, Code; *Reich vs. Bolch*, 68 Iowa, 526; *Glidden vs. Hibgee*, 31 Iowa, 379. No such issue was presented by the answer until the verdict had been returned. Nor does the record show the trial to have proceeded on that theory. The evidence of intoxicating liquors came out in proving the cost price of the stock, as bearing on the measure of damages; and the court, in overruling the motion to direct verdict at close of plaintiff's evidence, distinctly rejected the attempt to inject that issue when not properly plead. In the instruction submitting the interrogatory as to whether liquors were included in the stock, the jury was told not to allow that fact any influence in determining the case."

So, clearly under the statute and decisions of Iowa, if counsel for plaintiff in error had desired to raise that question, they should have done so in their pleading; but instead of allegating suicide and claiming that thereby the policy was forfeited, and that the incontestable clause as to suicide was void as against public policy, they went to trial upon the sole issue of whether or not he was dead or had absconded.

The commonest principle in pleading requires that if one has an issue upon which he relies, he should tender it in his pleadings, or at least in the course of the trial. If suicide as a defense had been tendered by the answer, it would then

have given plaintiff below an opportunity to avoid by alleging and showing that the party was insane at the time of the suicide, but by tendering no issue, no preparation could be made to show that fact. So by law and equity, they ought to have raised this issue before the completion of the trial, and not having done so, they are certainly estopped from doing it in the manner they did.

So this preliminary question of pleading should first be determined by this court. If the defense of suicide was not properly raised, there is no occasion to consider the other questions certified.

DOES THE INCONTESTABLE CLAUSE COVER THE RISK OF SUICIDE?

The policy contains this provision,

> "This contract shall be incontestable after one year from the date of its issuance provided the required premiums are duly paid."

There are two elementary principles of law that will assist in the interpretation of this provision.

1. An insurance policy being a unilateral contract will be construed most strictly against the insurer.

2. That where there is an express exclusion of one thing, it expressly includes others not excepted.

This clause clearly makes it incontestable except for nonpayment of premiums after one year. If the company had desired or intended to have excepted suicide it should have so expressly stated in its policy, and cannot now claim that it is excepted by implication.

This is a settled rule in the construction of such provisions. (See *Goodwin vs. Provident Life Ins. Co.*, 97 Iowa, 226; 32 L. R. A. 473; *Supreme Court of Honor vs. Updegraff*, 68 Kans. 474; *Mutual Reserve Fund Life Ass'n*, 32 S. W. 52; *Royal Circle vs. Achterwath*, 204 Ill. 549; 63 L. R. A. 452; *Clement vs. New York Life*, 42 L. R. A. 247.

Cooley's Brief on the Law of Insurance, Vol. 4, page 3229; *Thompson vs. Phoenix Life Insurance Co.*, 136 U. S. 287; *National Bank vs. Insurance Company*, 95 U. S. 673; *Mouler vs. Insurance Company*, 111 U. S. 335; *Wadsworth vs. Tradesman Company*, 132 N. Y. 550; *Fitch vs. Insurance Co.*, 59 N. Y. 557.

In the case of *Goodwin vs. Provident Life Insurance Company*, 97 Iowa, 233, the court says,

"The tenets established for the guidance of courts in such matters, are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted.

Now, by the terms of the policy it was incontestable, after two years from its date, subject, however, to the stipulations regarding payment of premiums, and extra-hazardous occupations. That is to say, claims under the policy by reason of the death of the assured, were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. * * * Defendant's counsel contend with much plausibility that death by suicide was a risk not contemplated by the parties, nor covered by the policy. But we think such a holding would import into the terms of a policy something not found therein, and not contemplated by the parties, at least not by the assured, at the time the policy was issued. And, as said in the *Wadsworth* case, 'We should adopt that construction which we think the insurer had reason to suppose was understood by the insured.' The proper construction of this policy, taken in connection with the application, we think is that the policy does not cover death by suicide, occurring within two years from the date of its delivery, but that after two years it is incontestable except upon the grounds stated therein. * * * We are the better satisfied with this conclusion, because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide, to a fixed period, and make their policies incontestable on that ground thereafter."

In Cooley's Brief above cited, the author says,

"The policy may contain a stipulation to the effect that after it has been in force a certain number of years it shall be incontestable, except for fraud in procuring it. Where the policy also contains a provision declar-

> ing suicide an excepted risk, the effect of the incontestable clause is substantially to convert the suicide clause into a limited exception and to render the insurer liable where death by suicide occurs after the time limited in the incontestable clause."

There can hardly be a chance for contention that after the expiration of one year the company intended to cover the risk of suicide as well as all other risks not excepted by the policy. There is no question that the policy was so drawn that the insured believed, and had a right to believe, that it covered the risk of suicide as well as all other risks not expressly excepted.

This leads us to discuss the third question.

IS THE RISK OF SUICIDE PROHIBITED BY LAW AS AGAINST PUBLIC POLICY?

No court has so far held that an express assumption of the risk of suicide is against public policy, with the possible exception of *Ritter vs. Mutual Life Insurance Company*, 69 Fed. 504. But in that case the question was not squarely presented as there was no such provision in the policy and what the court says is pure dictum. But we will discuss this case more fully hereafter.

On page 43, division 7, counsel for plaintiff in error discuss this question and cite, doubtless, all the authorities upon that subject. They say,

> "The incontestable clause does not preclude the defense of suicide, or self-destruction by the assured while sane."

They first cite *Scarborough vs. American Life Insurance Company*, 171 N. C. 353.

The question of suicide was not involved in that case. It was,

> "The execution of assured for crime in the absence of any reference thereto in the policy."

The case of *American National Life Insurance Company vs. Munson* is a case similar to the *Scarborough* case and does not involve the question of suicide. In the case of *Security Life Insurance Company vs. Dillard*, 117 Va. 41 there

was no incontestable clause, nor any implied assumption of the risk.

In the case of *Supreme Counsel Royal Arcanum vs. Wishart,* 192 Fed. 453, there was no incontestable clause in the policy, nor express or implied assumption of the risk of suicide.

In the case of *American National Insurance Company vs. Munson,* (Texas), 202 S. W. 987, was a case similar to the *Scarborough* case. It involved the question of "legal execution" and not the question of suicide. This was based upon a construction of a statute requiring insurance companies to insert an incontestable clause in the policy and holds simply that it was not within the intention of the legislature to cover the risk of "legal execution". But in the absence of this provision of the statutes the courts of Texas had held that suicide was not a prohibited risk. (See *Mutual Reserve Fund Life Association vs. Payne,* (Tex. Civ. App.) 32 S. W. 1063.)

From these two decisions it clearly appears that in the state of Texas the risk of "legal execution" is a prohibited risk while the risk of suicide is not a prohibited risk. A clear distinction arises in the two classes of risks.

In *Bromley's Admr. vs. Washington Life Ins. Co.,* 122 Ky. 402, was a wagering contract which the court held was contrary to public policy. There is no reference to the question of suicide.

In *Hall vs. Mutual Reserve Fund Life Ass'n,* 16 Pa. 31, the policy expressly "excepted the risk of death by suicide" and provided only for return of premiums in such case.

No one will argue seriously that an insurance company may except the risk of death by suicide and provide only for the return of premium except in those states where such exception is prohibited by statute.

In the case of *North American Union vs. Trenner,* 138 Ill. App. 586, the policy provided that if the member should die by his own hand, his beneficiary would receive only one-half of the policy, and making the policy incontestable after two years. The court in that case held that the beneficiary was entitled to recover only one-half. This is based upon the construction of the contract itself and we think rightly so. But the court expressly held that suicide was not a prohibited risk and although it appeared that the insured had committed suicide, a judgment was rendered for the beneficiary for one-half of the amount of the policy. Certainly if it is

legal to make a contract to pay one-half of the policy in case of suicide it would be legal to make a contract to pay all of it.

The case of *Childress vs. Fraternal Union*, 113 Tenn. 252, is of the same character. That policy provided that if the assured committed suicide the indemnity should be only one-third of the amount of the policy. There was an incontestable clause after two years, but the court held, and rightly, that that didn't affect the amount that the company had agreed to pay in case of death by suicide; that the terms of the contract were plain, but here also the court sustained the policy covering the risk of suicide for the amount that it had agreed to pay. There is certainly nothing in this case to indicate that if the policy had provided for full indemnity in case of suicide that it would not have been enforced. There is nothing in it to warrant the conclusion that suicide would defeat indemnity, or that it was a prohibited risk.

After a careful examination of all the authorities cited by the industrious counsel for plaintiff in error, assisted by the research of attorney for defendant in error, we feel warranted in stating that there is no case in the books where the question has been fairly presented that the express assumption of the risk of suicide has been held void as against public policy, except possibly the dictum in the *Ritter* case.

Counsel for plaintiff in error stated their proposition in these words,

> "But plaintiff in error claims that death by suicide, while sane, was not a risk assumed, nor one that could have been lawfully assumed."

This presents squarely the question for decision by this court as to whether or not an insurance company may lawfully assume this risk. No court has so expressly held unless the dictum in the *Ritter* case may be so construed.

That leads to a broad discussion of public policy, its origin and application.

UNIVERSALITY OF THIS CLAUSE.

It is interesting to trace the development of the practice by insurance companies as effecting the suicide risk and the decisions of the courts concerning the same.

In the earlier policies there was usually no reference to suicide. In construing such policies some courts held that thereby suicide was an accepted risk; other courts held that it was an excepted risk. To obviate this confusion in decisions, insurance companies generally put into their policy a clause excepting the risk of suicide. Then followed a line of decisions holding that this exception was not enforceable in case the insured was insane at the time of committing suicide. They then generally changed their policies providing that the policy would be void if the assured took his own life, "sane or insane". Public sentiment revolted at this harsh provision and insurance companies generally felt the force of public opinion. It became so strong that in many states of the union express statutes were passed against the defense of suicide. Insurance companies then generally went to the other extreme. They put in a clause making it incontestable, on that account, from date of issuance. This gave rise to fraud. It opened a way for taking out insurance policies with the express intent at the time of committing suicide. To avoid this situation insurance companies then began to cover the risk after a time limited, sufficiently long to rebut the presumption that the policy was taken out with the present intent of committing suicide. Some of the states went so far in their legislative enactments as to provide that no policy should be contested on account of suicide unless it be shown that an intent existed at the time of taking it out. Insurance companies have, therefore, in different forms inserted in their policies a provision that they are incontestable after a time limited. The "Handy Guide" of 1918 published by the Spectator Company contains, or purports to contain, forms of all the policies issued by the substantial insurance companies of the United States. From it will appear that nearly all the policies issued now contain a provision making the policy incontestable on account of suicide after a period limited among which may be named:

Aetna Life Ins. Co.	incontestable	after	1 year
American Central Life Ins.	"	"	" "
Bankers Life Ins. Co.	"	"	" "
Equitable Life Assurance Co.	"	"	" "
Federal Life Ins. Co.	"	"	2 years
Federal Mutual Life Ins. Co.	"	"	" "
First National Life Ins. Co.	"	"	1 year

Gibraltar Life Ins. Co.	"	" " "
Connecticut General Life	"	" " "
Connecticut Mutual Life	"	" " "
Home Life Ins. Co.	"	" " "
Metropolitan Life Ins. Co.	"	" 2 years
Mutual Life Ins. Co. of N. Y.	"	" " "
Mutual Benefit Life Ins. Co.	"	" 1 year
National Life Ins. Co.	"	" " "
N. W. Mutual Life Ins. Co.	"	" " "
Pacific Mutual Life Ins. Co.	"	" " "
Penn Mutual Life Ins. Co.	"	" " "
Phoenix Mutual Life Ins. Co.	"	" " "
Provident Mutual Life Ins. Co.	"	" " "
Prudential Ins. Co.	"	" " "
Scranton Life Ins. Co.	"	" " "
Security Mutual Life	"	" " "
State Life Ins. Co.	"	" " "
Travelers Ins. Co.	"	" " "
Union Mutual Life Ins. Co.	"	" " "
West Coast-San Francisco	"	" " "

This custom is so universal in this country that courts might rightly take judicial notice of it. This provision of the policy has been uniformly sustained by the Supreme Courts of the various states that have been called upon to pass upon the question. We have not found a single case of any state court that has held that the assumption of the suicide risk is contrary to public policy.

See:

Simpson vs. Life Ins. Co., 115 N. C. 393; 20 S. E. 517; *Steele vs. St. Louis Mut. L. Ins. Co.*, 3 Mo. App. 207; 2 Bacon, Ben. Soc. 694, Sec. 340a; *Mareck vs. Mutual Reserve Fund Life Asso.*, 62 Minn. 39; 54 Am. St. Rep. 613; 64 N. W. 68; *Goodwin vs. Provident Sav. Life Assur. Asso.*, 97 Iowa, 226, 32 L. R. A. 473; 59 Am. St. Rep. 411; 66 N. W. 157; *United Life Ins. Asso.*, 68 Hun. 144; 22 N. Y. Supp. 626, affirmed without opinion in 142 N. Y. 677; 37 N. E. 824; *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 570; 17 Am. Rep. 372; *Murray vs. State Mut. L. Ins. Co.*, 22 R. I. 524; 53 L. R. A. 742; 48 Atl. 800; *Wright vs. Mutual Ben. Life Asso.*, 118 N. Y. 237; 6 L. R. A. 731; 16 Am. St. Rep. 749; 23 N. E. 186; *Kline*

vs. National Ben. Asso., 11 Ind. 462; 60 Am. Rep. 703; 11 N. E. 620; *Mutual Reserve Fund Life Asso. vs. Payne*, (Tex. Civ. App.), 32 S. W. 1063; *Patterson vs. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118; 42 L. R. A. 253; 69 Am. St. Rep. 899; 75 N. W. 980; *Brady vs. Prudential Ins. Co.*, 168 Pa. 645; 32 Atl. 102; 19 Am. & Eng. Enc. Law, 2d Ed. p. 80; 2 Bacon, Ben. Soc., Sec. 340; 3 Joyce, Ins. 2581, Sec. 2644.

PUBLIC POLICY.

Counsel for plaintiff in error claims that a provision in the policy expressly waiving the defense of suicide after one year is contrary to public policy. Public policy is a shifting one, and is capable of being established by proofs. If they believed that the assumption of the suicide risk was against public policy and therefore void, they should have pleaded it. This would have opened the question of proof. Courts do not make public policy, they simply declare it and it therefore becomes a question of fact as to what public policy is at any particular time. This varies with the times and conditions of trade. What the community accepts as public policy the courts will enforce.

In Cyc. Vol. 23, page 444, the author says,

> "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce, and usages of trade, that it is difficult to determine its limits with any degree of exactness."

See also: Story on Contracts, (5th Edition) Sec. 675; *Eddington vs. Brownlow*, 48 L. cases, 123; *American Casualty Ins. Co.*, 42 Md. 574; *Kitchen vs. Greenabaum*, 61 Mo. 115; *People vs. Hawkins*, 157 N. Y. 1; *Hurd vs. Robinson*, 110 Ohio, 337; *Union Central Life Ins. Co. vs. Chaplin*, 65 Pacific, 836; *Kelley vs. Larkin*, 35 Wis. 136; In *Besant vs. Wood*, 12 C. H. C. 620, the court says:

> "Public policy is to a great extent, a matter of individual opinion because what one man or one judge might think against public policy, another might think altogether excellent public policy."

American Enc. of Law, Vol. 15, page 927, under the title of a legal contract, says:

"As to the matter of public policy, it might be said that suicide as a cause of death, bears so small a percentage of the other causes of mortality and is so infrequently committed, that insurance companies and mutual benefit associations should be permitted at their option, to provide in their policies and benefit certificates that voluntary suicide will avoid the contract, or leave them silent on that subject. It is a custom in this state at least so well established as to become a matter of common knowledge, that many life insurance companies and mutual benefit associations print their policies and certificates without the suicide clause and when getting insurance, or soliciting membership, point to that fact as evidence that their contracts are more favorable than those which contain such provision."

See also: Bacon's Life and Accident, Vol. 1, page 950; *Parker vs. Des Moines Life*, 108 Iowa, 117; *Seller vs. Life Ins. Co.*, 150 Iowa, 87.

All the states have, through their insurance departments, approved of policies covering the risk of suicide and all the Supreme Courts of the states have held the companies liable under such policies in case of suicide. What better or higher expression of public policy could be found?

It is clear that the states have control of insurance companies, and what kind of policies they may issue to their citizens. If they allow insurance companies to issue policies covering the risk of suicide and collect premium therefor, it would be an outrage for the courts to hold these policies void, and yet allow the insurance companies to collect and retain the premium therefor.

RITTER CASE.

It is claimed, however, that this court in the case of *Ritter vs. Mutual Life Insurance Co.*, 169 U. S. 139, has held that insurance companies have no right to assume the risk of suicide by a sane person and if they do assume such risk it would be void as against public policy. It may be conceded that there is language in that case justifying this contention, but a careful analysis of that case will show, however, that no such question was in fact involved, and that what the learned

court said on that subject was pure dictum and not *stare decisis*. The language used was in connection with an argument of the court as to whether or not in case of silence the risk of suicide should be presumed to be included or excluded. The policies in the *Ritter* case contained no express provision covering the risk of suicide, or any reference thereto. In the application there was an express warranty against suicide. It was plead and shown that the insured fraudulently contemplated suicide at the time of taking out of the policy. The policy in controversy in that case had no incontestable clause. The defense of fraudulent suicide was alleged and proved.

The case is not the same as the one at bar. This policy has an incontestable clause. There is no warranty against suicide either n the policy, or in the application. There was neither any pleading, or proof, that the insured had any fraudulent intent at the time of taking out the policy; it had been in force a sufficient length of time to rebut any such presumption.

In the *Ritter* case there were strong equities in behalf of the company that provoked strained construction. The insured in that case had taken out some $500,000.00 of insurance with the present design and intent of committing suicide so as to protect his creditors.

There is no such state of facts in the case at bar. Equity calls for a liberal construction of the rules of law and public policy. The company had demanded and collected premiums for covering the risk. The equities in the *Ritter* case would naturally induce a court of equity to relieve such fraud and injustice as was attempted in that case. The court in that case, however, does not decide the question involved in this case because no such question was presented. The language used and relied upon by counsel was simply used in argument in deciding the main issue involved.

The nearest that this question was ever squarely presented to this court was in the case of *Knight Templars vs. Jarman*, 187 U. S. 197, and *Whitefield vs. Aetna Ins. Co.*, 205 U. S. 489. In both of these cases this court squarely held that a state had a right to adopt its own policy on the question of suicide.

The state of Missouri had passed a statute preventing insurance companies from pleading the defense of suicide except where it is shown to the satisfaction of the court or jury that the party contemplated suicide at the time of taking out

the policy. This statute was assailed in this court as being in conflict with the doctrine announced in the *Ritter* case. It was claimed that it "encouraged suicide".

In the case of *Whitfield vs. Aetna Ins. Co.* the court says:

> "That the statute is a legitimate exertion of power by the State cannot be successfully disputed. Indeed the contrary is not asserted in this case, although it is suggested that the statute seemingly 'encourages suicide and offers a bounty therefor payable not out of the funds of the State, but out of the funds of the insurance company.'
>
> There is some foundation for this suggestion in the former decisions of this court in which it was held that public policy even in the absence of a prohibitory statute would forbid a recovery upon a life policy silent as to suicide where the insured while in sound mind willfully and deliberately took his own life. *Ritter vs. Mutual Ins. Co.*, 169 U. S. 139, but the determination of the present case depends upon other conditions than those involved in the *Ritter* case. The insurance company is not bound to make a contract which is attended by the risk indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it will not for that reason alone be disregarded, for it is the province of the State by its legislature to adopt such policy as it deems best, provided it does not in doing so come in conflict with the constitution of the State or of the constitution of the United States. There is no such conflict here. The legislative will within the limits stated must be respected if all that can be said is that in the opinion of the court the statute expressing that will is unwise from the point of public policy."

Now, it will be noted that the effect of the statute in controversy is to compel all insurance companies organized or doing business in the State of Missouri to carry the suicide risk whether they contract to do so or not. This court holds that this is not contrary to public policy, but expressly holds

that the State can adopt its own policy. Now, if it is not contrary to public policy for a State to force an insurance company to carry a suicide risk, by what sound reasoning could it be held that it is contrary to public policy for a State to allow insurance companies to expressly cover that risk. Missouri, as a legislative expression of this public policy, has declared that insurance companies must carry this risk. All the States, by the rulings of their Insurance Departments have allowed insurance companies to cover this risk and collect premium therefor, and their highest courts have held them liable thereon. By what sound argument, or judicial discrimination could the public policy of Missouri be sustained by this court and the public policy of other States be declared void? It would be equivalent to saying that a state may force the carrying of this risk, but may not allow it. The reasoning in these cases seem to us as an express repudiation or reversal of the dictum in the *Ritter* case wherein the court declared that it is contrary to public policy to allow an insurance company to cover this risk. Would there be any question that if a policy was issued to a citizen of Missouri containing an express assumption of this risk that it would be valid and enforceable? If not, why not? Missouri has declared its public policy and this court in these cases has recognized its right so to do. Why cannot other states declare their public policy and have it recognized and sustained by this court? Public policy can be evinced by the uniform manner of doing business as well as by statute. If all the states have allowed insurance companies to assume this risk and collect premium therefor and this has been uniformly sustained by the highest courts, why does that not establish a public policy for the state? By what sound reasoning can this court say that such a clause in a Missouri policy does not tend to the commission of crime and is not void as to public policy, and yet declare that a like clause in a policy issued in another state tends to the commission of crime and is therefore void as against public policy? The reasoning of these cases cannot be harmonized with the dictum found in the *Ritter* case, except upon the theory that this court recogizes the right of every state to adopt its own "public policy" on this subject.

These states by their highest court have all declared their public policy on this question. Under the rule announced in the *Whitefield* case, above cited, this court should follow the

public policy of the states, and not declare a conflicting public policy.

IMPORTANCE OF THE QUESTIONS CERTIFIED.

As practically all of the insurance companies doing business in this country have for the last twenty years been issuing policies covering the risk of suicide, and have been permitted by the states to issue them and collect premium therefor, it becomes a great question of public policy as to the status of these policies. Policies now outstanding cover billions of risks and involve millions of premiums paid for the risks. All of these policies have been issued under the sanctions of the states. Will this court now declare a rule of law that will render these policies void as to the insured, but valid as to insurance companies so that they can defeat recovery and yet hold the vast premiums collected for covering such risks? Will this court now adopt a rule that will unsettle this vast business?

ESTOPPEL.

Can an insurance company issue a policy covering suicide and collect a premium therefor and then declare that the provision of the policy covering that risk is void without returning, or offering to return, the premium collected? If it can, it can take advantage, of its own fraud. If the contract is void now, it was void when issued and the company would be presumed to know that fact. It would therefore be in a position of collecting the premiums and holding them for a policy that was absolutely void and known by the company to be void. No court has allowed this.

Cooley in his Brief on Law of Insurance, Vol. 1, page 610 says:

"ESTOPPEL BY RECEIVING AND RETAINING PREMIUM.

> In accordance with the general rule that estoppel may arise from the acceptance and retention of benefits is the principle that an insurer by receiving and retaining the premiums on a contract of insurance, is estopped to deny its power to issue the policy or that liability attached thereunder." Citing:

Lockwood vs. Middlesex Mutual Assur. Co., 47 Conn. 553; *Insurance Co. of North America vs. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Esch vs. Home Insurance Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Watts vs. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441; *Powell vs. Factors' & Traders' Ins. Co.*, 28 La. Ann. 19; *Hoge vs. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939.

When Insurance companies assume the risk of suicide they know conditions that produce it and the instincts that prevent it. They know that the instincts of life will prevent any one from taking his own life unless there is a cataclysm of some kind. They know that no man will let go of life unless something terrible happens to overcome his instinct. They know statistically and mathematically just what per cent of deaths result from this cause. They know this much better than the assured. They know that many deaths occur in this way even if it were not thought of by assured at the time of taking out the policy. If they coolly calculate the risk and collect a premium for carrying it, what sound edict of public policy forbids their paying if a loss occurs?

Suicide is not a legal crime in this country. There can be no legal crime without punishment of the offender. You cannot punish the dead. The only penalty that could be attached would be a taint of blood and this is prohibited by the constitution. It may be committed under circumstances that hardly makes it a moral crime.

Suppose a case of one having his face eaten away by cancer that is incurable. The sufferer knows that death is certain. He knows that nothing but agony and torture awaits his remaining days. He knows that his deformed and loathsome condition is shocking and disgusting to his friends and family. Could it be said that under such circumstances "that the ending of it all" would be a moral crime such as would defeat a policy which he had carried for long years to protect his family and dear ones?

For several years there has been a public sentiment aroused in this country that has reached legislative halls, calling for an enactment of a law allowing reputable physicians to administer the relief that is now universally granted to other life. No humane man would allow even a dumb brute that was mangled beyond the hope of recovery

to await the slow process of dissolution. And there is much of humanity in the plea that such relief can and should be administered to a human being. It might be dangerous to grant this power to the medical profession, but there certainly could be no very serious wrong if relief is sought by the patient himself.

Certainly it is not such a fraud upon the insurance company as ought to relieve it from paying the loss that it assumed.

Respectfully submitted,

S. F. PROUTY,
Counsel for Defendant in Error.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* JOHNSON.

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *v.* MILLER, ADMINISTRATOR OF JOHNSON.

CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 70, 71. Submitted October 22, 1920.—Decided November 15, 1920.

A provision in a life insurance policy declaring that the policy shall be void if within a certain time the insured, while sane or insane, shall die by his own hand, and a provision making the policy incontestable after a certain time, are both to be interpreted as implying that suicide of the insured, sane or insane, after the time specified, shall not be a defense. P. 102.

The validity of such agreements to pay life insurance, even when death is due to suicide, if it occur after the lapse of a certain time, depends upon the state public policy. Where it did not appear in what State the contracts in question were made, the court upheld them, which, *semble*, is in accord with the rule generally prevailing. P. 100.

THE cases are stated in the opinion.

Mr. George Lines for Northwestern Mutual Life Insurance Company. *Mr. Sam T. Swansen* was also on the brief:

It is undoubtedly the rule of the federal courts, as assumed in the question certified, that, where a policy of life insurance is silent respecting liability of the company in case of suicide by the insured, death of the insured by his own hand, he being sane, is not one of the risks insured against. *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139; *Hopkins* v. *Northwestern Life Assurance Co.*, 94 Fed. Rep.

729; *Mutual Life Ins. Co.* v. *Kelly*, 114 Fed. Rep. 268; *Royal Arcanum* v. *Wishart*, 192 Fed. Rep. 453.

So, death at the hands of the law as a punishment for crime is not one of the risks insured against, whether so stipulated in the policy or not. *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362; *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234. Nor is death at the hands of the beneficiary, assignee or other person entitled to the proceeds. *New York Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 591.

The decisions in these cases affirm and are based upon two fundamental principles: (1) That it is a condition of every policy of life insurance, implied if not expressed, that neither the insured nor the beneficiary shall do anything to wrongfully accelerate the maturity of the policy; and (2) that a contract by which an insurance company agreed to pay the sum stipulated in its policy upon the happening of either of the contingencies involved in the cases above cited would be contrary to public policy and void for that reason. Well-reasoned decisions of state courts are in harmony with the conclusions reached in the cases above cited. *Supreme Commandery* v. *Ainsworth*, 71 Alabama, 436, 445–447; *Hartman* v. *Keystone Ins. Co.*, 21 Pa. St. 466, 479; *Security Life Ins. Co.* v. *Dillard*, 117 Virginia, 401; *Davis* v. *Supreme Council*, 195 Massachusetts, 402; *Scarborough* v. *American National Life Ins. Co.*, 171 N. Car. 353; *Hatch* v. *Mutual Life Ins. Co.*, 120 Massachusetts, 550, 552; *Bloom* v. *Franklin Ins. Co.*, 97 Indiana, 478; *American National Ins. Co.* v. *Munson*, 202 S. W. Rep. 987.

These authorities establish not only the doctrine that death of the insured, directly and intentionally caused by himself when in sound mind, is not a risk intended to be covered by a policy of insurance which is silent respecting suicide, but the further doctrine that such risk is one which, on grounds of public policy, cannot lawfully be included by express stipulation.

But if, as held in the cases above cited, death of the insured, directly and intentionally caused by himself when in sound mind, is a risk which could not legally have been covered during the whole life of the policy, even by express stipulation to that effect, it is clear that such risk could not have been so covered during a portion of its life; and it necessarily follows that a contract to insure against such risk after two years from the date of the policy cannot be implied from the language quoted in Question One.

Under all the authorities, the doctrine that death of the insured by his own hand is not a risk insured against applies only in case the insured was sane at the time of taking his life. The object and effect of the quoted clause is to extend during the first two years of the policy's life exclusion of the risk of suicide to cases where the insured is insane, as well as to those where he is sane at the time of taking his life. *Royal Arcanum* v. *Wishart*, 192 Fed. Rep. 453, 456; *Scarborough* v. *American National Life Ins. Co., supra; Collins* v. *Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. Rep. 356; *American National Life Ins. Co.* v. *Munson, supra; Bromley* v. *Washington Life Ins. Co.*, 122 Kentucky, 407.

It is immaterial that the beneficiary named in the policy in suit was the wife of the insured, instead of his executors or administrators, as in the *Ritter Case.*

In discussing the first question certified, we have argued that intentional self-destruction while sane is a risk not covered by a policy "which makes no provision for death resulting from suicide," *i. e.*, is silent concerning the same. If this contention be sound, it necessarily follows that such a policy is not void, for, in such case, death by suicide being excluded from the risks covered by the policy, its validity as a contract respecting the risks included therein is not in any way affected. This conclusion is not affected by the fact that the policy contains a provision, that "if within two years from the date hereof, the said insured

shall . . . while sane or insane, die by his own hand, . . . this policy shall be void." This provision cannot by implication make suicide of the insured while sane one of the risks insured against, after the expiration of the two-year period, when an express stipulation to that effect, being contrary to public policy, would be void. As the authorities hereinbefore cited show, the purpose and effect of the two-year provision above quoted is to further limit, not to enlarge, the risk assumed. We submit, therefore, that Question Two should be answered in the negative.

If, however, it is deemed that from the provision in the policy just quoted it is to be implied that death of the insured by suicide, while sane, after the expiration of two years from the date of the policy, is one of the risks covered by it, then we say that under the decisions of this court and the weight of well-considered authorities elsewhere the policy is void to that extent.

Mr. George B. Young for National Life Insurance Company. *Mr. E. D. Perry* and *Mr. Guy B. Horton* were also on the brief.

Mr. S. F. Prouty for Johnson and Miller.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are suits upon policies issued to George P. Johnson upon his life, payable in the first case to his wife, in the second to his executors or administrators. The wife and the administrator respectively recovered in the District Court and the cases having gone to the Circuit Court of Appeals the latter has certified certain questions to this Court. The policy payable to the wife contained a provision that "if within two years from the date hereof, the said insured shall . . . die in consequence of a

duel, or shall, while sane or insane, die by his own hand, then, and in every such case, this policy shall be void." Johnson, the insured, died by his own hand more than two years after the date of the policy. The first question put in the wife's suit is whether the above provision, there being no other in the policy as to suicide, makes the insurance company liable in the event that happened. The second is in substance whether the contract if construed to make the company liable is against public policy and void.

The policy payable to the administrator had no provision as to suicide but did agree that "This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid." Johnson's suicide was more than a year after the date of the policy. The first question propounded is whether the above provision prevents the insurer from denying liability in this case, it not appearing that Johnson was insane when he killed himself. The second is whether such a contract which makes no exception for death resulting from suicide is against public policy, and therefore void. There is a third as to a possible distinction between insurance payable to the wife and that payable to the estate of the insured which will not need to be discussed.

The public policy with regard to such contracts is a matter for the States to decide. *Whitfield* v. *Ætna Life Insurance Co.*, 205 U. S. 489, 495. This case qualifies the statement in *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139, 154, to the effect that insurance on a man's own life payable to his estate and expressly covering suicide committed by him when sane would be against public policy. The point decided was only that when the contract was silent there was an implied exception of such a death. There was evidence that the insurance was taken out with intent to commit suicide, and it plainly appeared

that the act was done by the insured for the purpose of enabling his estate to pay his debts. The application, although excluded below, warranted against suicide within two years, within which time the death took place. So that all the circumstances gave moral support to the construction of the policy adopted by the Court in accordance with the view that has prevailed in some jurisdictions as to the general rule. In *Burt* v. *Union Central Life Insurance Co.*, 187 U. S. 362, it was held that there was a similar tacit exclusion from the risk assumed of the death of the insured by execution for murder, and the same decision was reached in *Northwestern Mutual Life Insurance Co.* v. *McCue*, 223 U. S. 234. But the question here does not concern implied exceptions, it concerns the effect of express undertakings which as we have said depends upon the policy of the State.

The certificates do not disclose in what States these contracts were made but it is not necessary to postpone our answer on that account. It appears from *Whitfield* v. *Ætna Life Insurance Co.*, *supra*, that some legislatures have thought it best to insist that life insurance should cover suicide unless taken out in contemplation of the deed. But the case is much stronger when a considerable time is to elapse before the fact that the death was by the insured's own hand ceases to be a defence. The danger is less sinister and probably a good deal smaller than the danger of murder when the insurance is held by a third person having no interest in the continuance of the life insured, yet insurance on the life of a third person does not become void by assignment to one who has no interest in the life. *Grigsby* v. *Russell*, 222 U. S. 149. When a clause makes a policy indisputable after one or two years, the mere evocation of a possible motive for self-slaughter is at least not more objectionable than the creation of a possible motive for murder. The object of the clause is plain and laudable—to create an absolute assurance of the benefit,

as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done. It is said that the insurance companies now generally issue policies with such a clause. The state decisions, so far as we know, have upheld it. Unless it appears that the State concerned adopts a different attitude we should uphold it here. *Simpson* v. *Life Insurance Co. of Virginia*, 115 N. Car. 393; *Mareck* v. *Mutual Reserve Fund Life Association*, 62 Minnesota, 39; *Goodwin* v. *Provident Savings Life Assurance Association*, 97 Iowa, 226; *Patterson* v. *Natural Premium Mutual Life Insurance Co.*, 100 Wisconsin, 118.

We are of opinion that the provision in the first mentioned document avoiding the policy if the insured should die by his own hand within two years from the date is an inverted expression of the same general intent as that of the clause in the second making the policy incontestable after one year, and that both equally mean that suicide of the insured, insane or sane, after the specified time shall not be a defence. It seems to us that that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable in the event that happened. We answer the first question in each certificate, yes. The other questions are disposed of by our answer to the first.

Answer to question 1 in No. 70, Yes.
Answer to question 1 in No. 71, Yes.

MR. JUSTICE DAY took no part in the decision of these cases.